SOME LEGAL ASPECTS OF THE INTERNATIONAL SEA-BED AUTHORITY

by

METLAQ AL-METAIRI

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CONTENTS

Abstract

This thesis aims to focus on the question of the Area and its International Sea-Bed Authority at this present stage. The new legal regime governing the Area has been formulated in Part XI of the Convention by almost all countries of the world as the common heritage of mankind. Nevertheless, a number of retrograde developments have occurred. These developments include the enactment of domestic laws for exploitation in the Area by some dissenting industrialized countries at a time when consensus on the internationally negotiated legal regime was almost at hand and the fall in demand for the metals contained in manganese nodules for the deep sea-bed. State practice in the form of actual recovery of mineral resources has not yet taken place, and the law is worked out in anticipation of such a practice.

In this study there are eight chapters. Chapter One is an introductory treatment of the whole thesis. The purpose of the study, and the development of the new legal regime in Part XI of the 1982 Convention, are included in this chapter. The second chapter examines the question of the limits of national jurisdiction with particular regard to the sea-bed. Chapter Three outlines the arguments for and against the classic doctrines such as *res communis* and *res nullius*, and rejects them as legally valid bases for claims to the deep sea-bed. The concept of the common heritage of mankind on which Part XI of the Convention is based, is dealt with in Chapter Four. Chapter Five explains the Parallel System as it is

laid down in the Convention. Chapter Six deals with the legal aspects of the International Sea-Bed Authority and the organs which directly or indirectly are related to it. Chapter Seven reviews the developments in the Preparatory Commission for the International Sea-Bed Authority since the beginning of its work in 1983. The last chapter presents the general conclusions of the study.

The Authority with its present structure and functions is an entity under the effective control of its members. Its strength depends on the modifications which may be introduced by the Preparatory Commission, especially with regard to the decision-making mechanism.

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Abbreviations

AJIL	American Journal of International Law
Area	Sea-Bed and ocean floor and subsoil thereof beyond the limits of national jurisdiction
Authority	International Sea-Bed Authority
BYIL	British Year Book of International Law
Cand. YBIL	Canadian Year Book of International Law
CLP	Current Legal Problems
Col. JTL	Columbia Journal of Transnational Law
Conference	Third United Nations Conference on the Law of the Sea 1973–1982
Convention	1982 Convention on the Law of the Sea
EEC	European Economic Community
EEZ	Exclusive Economic Zone
Grot. Trans.	Transactions of Grotius Society
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICNT	Informal Composite Negotiating Text (1977)
ICNT/Rev. 1	First Revision of the ICNT (Spring 1979)
ICNT/Rev. 2	Second Revision of the ICNT (Summer 1980)
IJIL	Indian Journal of International Law
I.Law.	International Lawyer
ILA	International Law Association
ILC	International Law Commission
ILM	International Legal Materials
ILR	International Law Reports
IYBIL	Italian Year Book of International Law
Law. Am.	Lawyer of Americas

Abbreviations (contd.)

LCP	Law and Contemporary Problems
LOS	Law of the Sea
ISNT	Informal Single Negotiating Text (1975)
MRE	Marine Resource Economics
NIEO	New International Economic Order
NILR	Netherlands International Law Review
NRL	Natural Resources Lawyer
NYUJIL	New York University Journal of International Law and Politics
ODIL	Ocean Development and International Law
Off. Rec.	UNCLOS III Official Records
PCIJ	Permanent Court of International Justice
PLR	Pace Law Review
Proc. ASIL	Proceedings of the American Society of International Law
RDC	Recueil des Cours
RSNT	Revised Single Negotiating Text (1976)
SDLR	San Diego Law Review
SNT	Single Negotiating Text (1976)
Syr.JIL.Com.	Syracuse Journal of International Law and Commerce
UN	United Nations
UNCLOS III	Third United Nations Conference on the Law of the Sea 1973-1982
UNCTAD	United Nations Conference for Trade and Development
UN Doc.	United Nations Document

Abbreviations (contd.)

UNTS	United Nations Treaty Series
Virg.JIL	Virginia Journal of International Law
YB	Year Book
YBILC	Year Book of International Law Commission
ZaoRv	Zeitschrift fur Auslandisches Offentliches Recht und Volkerrecht

CHAPTER ONE

INTRODUCTORY OBSERVATIONS

SECTION I: GENERAL PRESENTATION OF THE THESIS

The Law of the Sea Convention [hereinafter cited as the Convention] is one of the significant conventions recently adopted by the United Nations.

This Convention, in Part XI, contains specific articles relating to the new legal regime governing the International Sea-bed Area and its resources beyond the limits of national jurisdiction and the establishment of an International Sea-Bed Authority to implement the provisions of Part XI of the Convention.

The process of formulating the provisions of Part XI, in fact, was started by the United Nations during the 1960s. The discovery of polymetallic nodules such as nickel, copper, cobalt and manganese on the deep ocean floor accelerated this study by the United Nations and its affiliated agencies. Certain questions were put to the representatives of governments; these included what legal principles govern that area and its resources and who has the right to exploit the mineral resources.

In 1967, Arvid Pardo, Malta's representative to the United Nations, submitted an initiative to the General Assembly in which he had referred to the sea-bed and subsoil and the resources thereof beyond the limits of national jurisdiction as the common heritage of mankind.[1] This initiative was the driving force at the start of a process which has lasted until now, and can rightly be described as a successful attempt to harmonize the interests of the sovereign states with the interests of mankind as a whole.

The compromise of individual states' interests with world interests is a new idea in international law. What Pardo's initiative and the concept of the common heritage of mankind have introduced is very interesting indeed. According to the common heritage principle, the interests of individual states were to be dominated by the interests of mankind. The introduction of this concept was resisted, however, by some developed countries.

The process of many years of negotiations in the United Nations for the creation of a new legal regime for the deep sea-bed and its mineral resources is, in fact, a conflict between a few industrialized countries which have tried to invoke and extend the principle of the freedom of the high seas to all uses of the sea on the one hand, and the great majority of states, which have had the preservation of the interests of mankind as their primary objective, on the other.

It was generally understood from the outset that the legal regime which should emerge from the negotiations had to be agreed upon by the international community as a whole, because the declared claims for the deep sea-bed and its mineral resources, either by mankind or individual states, were so specified that no legal security could exist in that area without the consensus of all states. The problem was thus how to balance the interests of states with the interests of the world community so that a consensus could be achieved.

For the purpose of illustration in our discussion of this subject of study, states are classified into two major groups: developing and industrialized countries. Under this general classification, what is the meaning of 'developing countries' and

'developed countries'? The developing countries include all Latin American, all African states except for South Africa, and almost all Asian countries. The industrialized countries were those states which either had the required technology, or the investment possibilities, and included the United States, United Kingdom, Federal Republic of Germany, France, Italy, Belgium, The Netherlands and Japan. In both these groups there could exist differing views with respect to the legal regime of the deep sea-bed and its machinery, but as regards the major issues such as the legal status of the deep sea-bed exploitation system of the mineral resources and the international organization for the administration of the resources, each group had a uniform consolidated position which was clearly distinguishable from that of the other.

The position of the socialist countries has fluctuated. Up to the start of the Conference in 1974, they had adopted the same position as the industrialized countries, but since then they have shifted their position to that of the developing countries. Developing and industrialized countries each had their own objectives concerning the regime which was to be created for the exploitation of the mineral resources of the sea-bed.

The introduction of the concept of the common heritage of mankind agreed with the argument of the developing countries for the establishment of a New International Economic Order. What the developing countries (or as so called, the Group of 77) could see in that concept was an egalitarian base which underlay all constituent elements of a whole where balance was obtained through taking from the rich and giving to the poor.2 Thus, for the developing countries, the sea-bed and subsoil thereof beyond the limits of

national jurisdiction and their mineral resources constituted a common and indivisible property belonging to the whole of mankind. As such, those resources should be used solely for the benefit of all mankind and administered by an international organization with exclusive jurisdiction in that respect. No national claims to any part of those areas and their resources were therefore acceptable.

The first reaction of the industrialized countries to the concept of the common heritage of mankind was to reject it as a vague concept, more moral and political than legal. Although the concept was latterly recognized as the principle governing the deep sea-bed and its resources by the unanimous adoption of the General Assembly Resolution 2749 (XXV) - the Declaration of Principles[3] - the industrialized countries continued to refuse that concept as the legal principle applicable to that area. For these countries, the principle of the freedom of the high seas extended to all the uses of the sea including the exploration and exploitation of the mineral resources of the deep sea-bed. The problem was how to reconcile the freedom of the high seas with the exclusive right that was required for activities on the deep sea-bed. Unlike fishing, navigation and other uses of the sea, deep sea-bed mining activities required exclusive rights to a large area of the deep sea-bed and for a long period of time. The precedents in the case of sedentary fisheries and the continental shelf could not allow support for any claim of exclusive rights to the deep sea-bed. Therefore, the solution was sought in the establishment of an international organization for registering the claims, or at most issuing licences. Thus, the industrialized countries did not think of a common property, to be managed by an international organization as

the sole agent of mankind, but rather as a res communis, open to use by all nations, whether they could or could not avail themselves of this opportunity. While for the developing countries, the common heritage principle had a strong moral obligation, the industrialized countries approached the question in a business-like fashion.

The conflict of these two opposing positions resulted in the emergence of an arrangement which is generally known as the Parallel System. According to this system, the International Sea-Bed Authority, invested with operational powers on behalf of mankind on the one side, and the states parties to the Conventions or their entities on the other, may engage in activities on the deep sea-bed.

However, this arrangement, which was originally suggested and worked out by the industrialized countries, had not become acceptable to some of these countries by the time the Convention was ready to be adopted, and subsequently the United States, the United Kingdom and the Federal Republic of Germany refused to sign the Convention on the ground of dissatisfaction with Part XI concerning the legal regime of the deep sea-bed. The United States enacted legislation for deep sea-bed mining, and this practice was followed by two other non-signatories, i.e., the United Kingdom and the Federal Republic of Germany, and four other states which had signed the Convention, namely the Soviet Union, France, Japan and Italy.

These national laws, which have an interim character pending the entry into force of the Convention for the enacting states, generally permit the start of commercial exploitation of deep sea mineral resources by the subjects of the related states from 1 January 1988. Developing countries have stood against these laws as wholly illegal and in disagreement with the principle of the

common heritage of mankind, and have also expressed the view that such laws are in contradiction of the principle of good faith which has been presumed during the years of negotiations.

(a) The Purpose of the Investigation

It is worthwhile to focus on the new international legal regime relating to the deep sea-bed Area at its present stage. The adoption of the Convention in 1982 and its Part XI and related annexes which embody the new legal regime for the deep sea-bed on the one hand, and the enactment of the national legislation for deep sea-bed activities by some industrialized countries on the other, gives rise to one main question. What is the existing international law in respect of the sea-bed mining activities? Since we believe that the regime incorporated in Part XI of the Convention and its related annexes characterizes the present status of law in this regard, the thesis is mainly aimed at elaborating the process of law-making for the Sea-bed Area through the United Nations, taking into consideration the views of both developing and developed countries. In this connection, an attempt has been made to answer some questions: has the legal regime embodied in the Convention successfully filled in the gaps that existed before the adoption of the Declaration of Principles in 1970 and the adoption of the Convention in 1982? Is the Parallel System, which is the outcome of many compromises between the developing and industrialized countries, an effective legal arrangement? How much does the Parallel System reflect the balance of interests between

states and the international community? Has the Authority sufficient power and legal capacity as the agent of mankind? And what role does the Authority have to play in the international area? Is the condition of efficient enforcement of law through the establishment of an effective system for disputes settlement fulfilled? These and many other questions may be combined within one single investigation: is the regime in question a viable legal order for the exploration of the deep sea-bed and exploitation of its mineral resources?

As regards national law, the main concern is to examine the applicability of the principle of the freedom of the high seas to deep sea-bed activities as the legal justification of these laws, the alleged compatibility of the said laws with the purposes of the Convention, and their impact as state practice on the formation of new rules of customary international law.

Being the result of the first active participation of the majority of the developing countries in the development of international law, it is also relevant to ascertain the substance of the outcome, and whether the legal regime embodied in the Convention represents a universal law as distinct from other branches of international law which are reflected by the influence of the practice of a few developed states.

By adopting an analytical approach, the answers to these and other questions are drawn principally from the documents of the United Nations; through the scrutiny of the drafting history of the Convention by the Conference and from the national laws themselves. On the basis of this investigation, it is concluded: (1) there now exists a firm legal principle governing the Area and its resources,

i.e., the principle of the common heritage of mankind; (2) the many compromises of the developing countries in order to reach agreement by consensus on the system of exploitation have resulted in a clear change of balance of interests in favour of the industrialized countries; (3) the Authority, despite its responsibility, which is the representation of mankind in the Sea-bed Area activities, has a defined power far less than what was originally anticipated for it; (4) the establishment of the compulsory dispute settlement procedures may, in the long run, make the Parallel System workable; (5) with respect to national laws, because of strong and consistent protests by the majority of countries, and the apparent incompatibility of these laws with the negotiated regime in the Convention, the practice of states in this regard is unlikely to create an alternative legal order stable enough for the fulfilment of its purposes; (6) the contribution of the developing countries to the establishment of the legal regime for the Sea-bed Area has demonstrated that the answer to global problems can be sought only in the cooperation of all the states. Customary international law may no longer be interpreted as the practice of a few states extended to the rest of the world.

We further intend to establish that the regime as now integrated in the Convention may not prove to be viable. Nevertheless, this should not be interpreted as undermining the outcomes which have been achieved. The disadvantages of the said legal regime can be compensated for either through the Review Conference, which provides for the revision of the system of exploration and exploitation fifteen years after the start of the earliest

commercial production under the Convention, or through the negotiations of the Preparatory Commission.[4]

(b) The Structure of the Investigation

The legal regime for the Sea-bed Area is a complex subject. Any study on this subject may entail an effort to answer a number of questions: Where is the deep sea-bed area? What is its legal status? How and by whom should its resources be administered? How should the disputes arising from the activities on the sea-bed be settled? And how should the law be in future with regard to the application of the present regime?

All these questions are inter-linked, but each deserves to be treated separately. The questions have been divided into eight chapters. Although each question is studied in its own context, an inter-disciplinary approach has been applied to identify the relationship of each element to the other components of the legal regime of the deep sea-bed area.

Chapter One aims, firstly, to present the question, the purpose of the investigation, and the conclusions that are to be examined throughout the work. It also includes the structure of the investigation. Secondly, this chapter gives an overview of the 1982 Convention. A succinct understanding of the developments, mainly within the United Nations, which led to the establishment of the new legal regime governing the international Sea-bed Area and its mineral resources in Part XI of the Convention, is dealt with. The chronology of developments in the United Nations in respect of

the Sea-bed Area covers briefly the sea-bed mineral resources, the work of the Committees and the Conference as well as as well as an introduction to the general aspects of the 1982 Convention on the Law of the Sea.

The second chapter deals with the question of the limits of national jurisdiction with particular regard to the sea-bed. It is shown in this chapter, firstly, that the limits of coastal jurisdiction have extended so much that the extension was regarded as unthinkable when the idea of declaring the deep sea-bed area and its resources as the common heritage of mankind was born. This considerable extension of coastal zones had an important feature. It has decreased the areas which were originally meant to be the common heritage of mankind. Secondly, an examination of Article 76 of the Convention containing the definition of the continental shelf exposes that, despite all attempts to work out a precise outer limit for the continental shelf, the outcome can only with difficulty be called precise. Therefore, it is still legally unclear where the exact limits of the sea-bed lie.

Chapters Three and Four intend to deal with the question of the legal status of the deep sea-bed and its resources This is an important question, the answer to which may determine the studies with respect to other related questions. The positions of the developing and industrialized countries in this regard were different. The legal status of the deep sea-bed for the industrialized countries was the same as that of the superjacent waters, i.e. <u>res communis</u> and the principle of the freedom of the high seas was likewise extendable to the sea-bed. Thus, every

state could engage in activities on the deep sea-bed provided reasonable regard was shown to the interests of other users.

For the developing countries, on the contrary, freedom of the high seas, which did not entail equal opportunities for all users, was inappropriate; it was an outmoded concept which could only serve the purposes of big maritime powers. For them therefore, the common heritage of mankind with its inherent element of distributive justice - by all, for all - had come to govern as the prevailing principle on the deep sea-bed and its resources.

Chapter Three outlines all the arguments for and against the classic doctrines such as res communis and res nullius, and rejects them as legally valid bases for claims to the deep sea-bed. The concept of the common heritage of mankind is dealt with in Chapter Four, where a rather comprehensive account of the developments which led to the consolidation of that concept into a general principle of international law is provided. The legal status of the deep sea-bed as the common heritage of mankind requires that all activities in the deep sea-bed derive their legality from the arrangement envisaged in the Convention.

An additionally important question is how and by whom the activities in the Sea-bed Area should be implemented. Chapters Five and Six examine possible answers to this question. Chapter Five deals with the Parallel System of exploitation as it is laid down in the Convention. The balance of rights between mankind and its trustee, the International Sea-Bed Authority, on the one side, and states parties and their entities, on the other, is examined.

Chapter Six is devoted to an examination of the structure of the International Sea-Bed Authority and the organs which directly or

indirectly are related to it. In addition to the Assembly, the Council, the Secretariat and the Enterprise, the machinery for disputes settlement is also considered. It is our intention to show that the Authority with its present structure is a vulnerable entity under the effective control of its members. Its strength depends, to a great extent, on the modifications which may be introduced by the Preparatory Commission, especially with regard to the decision-making mechanism.

Chapters Seven and Eight contain a prospective view on the issue. In Chapter Seven, a review of the developments in the Preparatory Commission for the International Sea-Bed Authority and the International Tribunal for the Law of the Sea since the beginning of its works in 1983 until the present period is given. Finally, in the last chapter, the general conclusions of the study are presented.

SECTION II: AN OVERVIEW OF THE UNITED NATIONS' PRACTICE ON THE SEA-BED ISSUE

(a) Sea-Bed Mineral Resources

Before we discuss the United Nations' practice on the sea-bed issue, a brief account of the mineral resources is given in order to understand the legal regime of the sea-bed established by the Convention. This account, in fact, answers two important

questions: what the mineral resources are and what economic significance they have.

The chief important mineral resources of the sea-bed are the polymetallic or manganese nodules. They are normally found in areas at depths of 5,000 metres or more.[5] Nodules are scattered on wide areas of the floor of the Atlantic, the Indian and the Pacific Oceans. Nodules contain manganese, nickel, copper and cobalt. The estimates of the average percentage of these minerals contained in nodules differ, but figures cited for economically exploitable nodules are 1.3 per cent nickel, 1 per cent copper, 23 per cent manganese and 0.22 per cent cobalt.[6] The most attractive nodule deposits appear in the south east and central north Pacific Ocean, in an area known as Clarion Clipperton Zone.[7] This zone, according to some estimates, contains about 2.1 billion tons of recoverable nodules.[8] Out of the components of manganese nodules, nickel is economically most important. It is primarily the price of nickel which may determine the profitability of sea-bed mining activities, but some other metals such as copper and cobalt can also play a role in this respect.[9]

Canada has been traditionally the largest producer of nickel, but also from a few other regions in New Caledonia, the Soviet Union and Australia a considerable contribution has been made to the world production of nickel.[10] The Soviet Union and Cuba together have 20 per cent of total world nickel reserves.[11] While the first substantive session of the Conference in 1974 started its work with optimism about the prospect for future growth in the nickel market,[12] the low economic growth in the West in later years resulted in a fall in demand. This has been the main reason why,

since the start of the present decade, no considerable new investment has been made in sea-bed mining, waiting for the recovery of the market for nickel.

Second in importance of the manganese nodules is copper. This metal has a diverse production pattern, and industrialized countries are the largest producers and consumers. The United States is the world's largest single producer of copper. It is generally expected that production from the nodules would have a very minor impact on the copper market.[13]

Cobalt is a relatively expensive mineral with a small market, and its value in world commodity trade is rather small. Cobalt is a by-product of nickel or copper. It is only in Morocco and Zaire that it can be mined independently and not as a by-product.[14] Zaire alone is responsible for over 50 per cent of the world production of cobalt.[15] It is estimated that the first phase of ocean mining would account for about the volume of world output, and could cause a price decline of about 35 per cent of the 1978 price.[16]

Of the four minerals in question, manganese is the cheapest. That is because land mines are numerous. The main use of manganese is in the steel industry, and it is of vital importance for the developed countries.[17] The Soviet Union possesses the largest manganese reserves in the world. The two largest producers of this metal, the Soviet Union and South Africa, account for about 60 per cent of world total output of manganese.[18]

The land producers of these four metals are both developing and developed countries, but since the production and export of these metals in developing countries usually constitutes the greatest

share of their income, it is mainly these countries which will suffer most from sea-bed mining.

Nickel, cobalt and copper are considered by some industrialized countries as strategic metals.[19] The United States imports all its primary consumption of nickel, cobalt and manganese.[20] Japan depends on imports for 100 per cent of its nickel and cobalt, 97 per cent of copper and about 95 per cent of manganese.[21] The Western European countries are also greatly dependent on the import of the metals in question and in this respect particular mention should be made of the Federal Republic of Germany and the United Kingdom.[22] The Soviet Union is self-sufficient in respect of these metals. It is even a major exporter of nickel and manganese.

(b) The United Nations' Practice on the Sea-Bed Issue

The involvement of the United Nations in the effort for the progressive development[23] of international law with respect to the sea-bed and its resources started in the 1960s. Two conferences on the law of the sea were convened in 1958 and 1960. They focused mainly on the readily accessible areas and those of immediate interest to the coastal states: the territorial sea from the point of view of security of the coastal state; the continental shelf for its resources; and the high seas for navigation and fishing. The sea-bed beyond the continental shelf was remote because the area was technologically inaccessible and there was little knowledge of its potential wealth. In 1966 the problem of the sea surfaced, in the context of the development programme, as a

practical contribution to the second half of the UN Development Decade. The Economic and Social Council of the United Nations (ECOSOC) in 1966 adopted an important resolution,[24] which requested the Secretary-General, inter alia, to make a survey of the present state of knowledge of these resources of the sea (minerals and food, excluding fish) beyond the continental shelf, and of the techniques for exploiting these resources, to identify those resources now considered to be capable of economic exploitation, especially for the benefit of the developing countries, and to identify any gaps in available knowledge, which merit early attention by virtue of their importance to the development of ocean resources, and of the practicality of their early exploitation.

The General Assembly adopted in the same year Resolution 2172 (XXI)[25] which requested the UN, in cooperation with its agencies and interested member states, to undertake a comprehensive survey of activities in marine science and technology, including mineral resources, and to formulate proposals with regard to the exploitation and development of marine resources. The above UN initiative sprang from the UN Development Decade and the Expanded Program for Ocean Exploration, and it focused on the scientific aspects of oceanography rather than all aspects of the law of the sea. In fact, this was when the real focus on all aspects of the law of the sea, and especially the law governing the sea-bed, began.

The Secretary-General,[26], pursuant to the above-mentioned resolutions, submitted two reports stressing the need to examine "the advisability and feasibility of entrusting the deep-sea resources to an international body".

The new law of the sea-bed beyond the limits of national jurisdiction was started on 17 August 1967 when Ambassador Arvid Pardo, the permanent representative of Malta to the United Nations, suggested the inclusion of the following item in the agenda of the 22nd session of the General Assembly:

> Declaration and treaty concerning the reservation exclusively for peaceful purposes of the sea-bed and ocean floor, underlying the seas beyond the limits of the present national jurisdiction and the use of their resources in the interest of mankind. 27

The General Assembly adopted a resolution for the establishment of an Ad Hoc Committee to study the peaceful uses of the sea-bed and the ocean floor beyond the limits of national jurisdiction to become a Standing Committee - The Sea-Bed Committee - which continued its work until 1973 when the Third United Nations Conference on the Law of the Sea (UNCLOS III) was convened. The work of the conference was concluded by adopting the United Nations Convention on the Law of the Sea in 1982 (the Convention). The following is a brief account of the work of the Committees and the Conference as well as an introduction to the general aspects of the Convention.

(c) The Sea-Bed Committee

The first response of the United Nations to the question of establishing an international regime for the management of the Sea-bed Area and its resources was the adoption by the General Assembly Resolution 2340 (XXII),[28] on 18 December 1967, according to which an Ad Hoc Committee would be established "to study the peaceful uses of the sea-bed and the ocean floor Beyond the Limits

of National Jurisdiction". The number of members on the Ad Hoc Committee was limited to 35 nations.[29] The Committee elected Hamilton Shirly Amerasinghe from Sri Lanka as the President, and established two working groups:[30] the Economic and Technical Working Group and the Legal Working Group.

On 21 December 1968 the General Assembly adopted Resolution 2467 (XXIII)[31] which created a Standing Committee, the Committee on the Peaceful Uses of the Sea-bed and Ocean Floor Beyond the Limits of National Jurisdiction (the Sea-Bed Committee). The number of members of the Sea-Bed Committee was increased to 42,[32] and its mandate also became much broader. The Sea-Bed Committee was charged, inter alia:

a. To study the elaboration of the legal principles and norms which would promote international co-operation in the exploration and use of the sea-bed and ocean floor, and subsoil thereof, beyond the limits of national jurisdiction and ensure the exploitation of their resources for the benefit of mankind, and economic and other requirements which such a regime should satisfy in order to meet the interests of humanity as a whole.

b. To study the ways and means of promoting the exploitation and use of the resources of this area, and of international co-operation to that end, taking into account the foreseeable development of technology and the economic implications of such exploitation and bearing in mind the fact that such exploitation should benefit mankind as a whole;

c. To review the studies carried out in the field of exploration and research in this area and aimed at intensifying international

co-operation and stimulating the exchange and the widest possible dissemination of scientific knowledge on the subject;

d. To examine proposed measures of co-operation to be adopted by the international community in order to prevent marine pollution which may result from the exploration and exploitation of the resources of this area.

One of the hard-core issues before the Committee was how to establish the limits of coastal state jurisdiction, and thereby the limits of the international Sea-bed Area. Due to differences in opinion with regard to the lawfulness of rules for the establishment of the outer limit of the Continental Shelf, Malta submitted a draft resolution on 31 October 1969 to the General Assembly revising the definition of the Continental Shelf, and adopting "a precise and internationally acceptable definition of the deep ocean floor".[33] The proposal was amended by other delegations which wanted the future conference to discuss all questions of the Law of the Sea.[34] The General Assembly adopted on 15 December 1969 Resolution 2574 (XXIV)[35] in which the Secretary-General was requested to "ascertain the views of member states on the desirability of convening at an early date a conference on the Law of the Sea to review the regimes of the high seas . . .".

In addition to the previous Resolution, the General Assembly adopted the related Resolution 2574 D.[36] This Resolution declared that:

> pending the establishment of the international regime:
> (a) States and persons, physical or juridical, are bound to refrain from all activities of exploitation of the resources of the area of the sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction.
> (b) No claim to any part of that area or its resources shall be recognized.

This Resolution took the name of Moratorium Resolution[37], and almost all votes against it came from the industrialized countries.

The outcome of the work of the Sea-Bed Committee in 1970 was the adoption by the General Assembly of Resolution 2749 (XXV)[38] - The Declaration of the Principles[39] - which is considered to be a cornerstone in the history of the developments of the law of the deep sea-bed area. The Resolution, which was adopted on 17 December 1970, by 108 in favour and none against, with 14 abstentions, covered most of what Mr Pardo had envisaged. This Declaration consisted of a preamble and 15 main principles. The preamble reaffirmed that there exists a sea-bed and ocean floor area outside the limits of national jurisdiction; although precise limits for this area were not defined. It was further acknowledged that the existing system of international law did not have exact rules that regulated exploration and exploitation of its resources. The third paragraph of the preamble laid down the principle that this area should be reserved exclusively for peaceful purposes and that exploration of its resources should be carried out for the benefit of mankind as a whole.

Under the Declaration of Principles Resolution, the concept of the common heritage of mankind was formally explained.[40]

In 1970, Resolution 2750 (XXV) was adopted. This Resolution was composed of three parts. In Resolution 2750 A,[41] the Secretary-General was requested to:

> Identify the problems arising from the production of certain minerals from the area beyond the limits of national jurisdiction and examine the impact they will have on the economic well-being of the developing countries, in particular on prices of mineral exports of the world market.

Resolution 2750 B[42] requested the Secretary-General to study the particular needs and problems of land-locked countries.[42] Resolution 2750 C[43] provided for the increase of the membership of the Sea-Bed Committee to 86 nations.[44] More significantly, it enlarged the mandate of the Sea-Bed Committee by assigning it as the preparatory Committee for the United Nations Conference on the Law of the Sea to be convened in 1973. The Committee was thus mandated to deal not only with questions relating to the establishment of an equitable international regime, including an international machinery for the area and the resources of the deep sea-bed beyond the limits of national jurisdiction, a precise definition of the area, but also a broad range of related issues including those concerning the regimes of the high seas, the continental shelf, the territorial sea (including the question of its breadth and the question of international straits used for international navigation) and contiguous zone, fishing and conservation of the living resources of the high seas (including the question of the preferential rights of coastal states), the preservation of the marine environments (including, inter alia, the prevention of pollution) and scientific research.

In order to cope with its enlarged mandate, the Sea-Bed Committee established, in 1971, three sub-committees of the whole. The task of preparing draft treaty articles embodying the international regime and machinery for the deep sea-bed and its resources was entrusted to Sub-Committee I.[45]

Sub-Committee II was given the duty of preparing a comprehensive list of traditional subjects and issues of the law of the sea. The preparation of the draft articles concerning the

preservation of the marine environment and scientific research was allocated to Sub-Committee III.[46]

In 1972, the membership of the Sea-Bed Committee was once again enlarged, now to 91 nations. Sub-Committee I, under the chairmanship of P.B. Engo from Cameroon, adopted a programme of work in that year. Item 1 of this programme dealt with status, scope and basic provisions of the regime based on the Declaration of Principles. Item 2 was about the status, scope, functions and powers of the international machinery.[47]

Following the proposal of the chairman of Sub-Committee I, a working group on the international regime with 33 members was established. The mandate of this working group was to draw up a working paper showing the areas of agreement and disagreement on various issues related to the sea-bed area and its resources.[48] The text reflected agreement that the area and its resources are the common heritage of mankind.[49] In 1973, when the Sea-Bed Committee had concluded its work, Sub-Committee I had succeeded in preparing texts illustrating areas of agreement and disagreement on items 1 and 2 in its programme of work.[50] These illustrative texts indicated that it was obvious that, as a guide for discussion at the Conference, they were hardly on the same standing as text usually prepared by a specialized expert body such as the International Law Commission.[51] The latter would appoint a special rapporteur for the subject and, in due course, issue a set of draft treaty articles which would be submitted to governments for comments and which would undergo a series of revisions. When the ILC's draft was considered to be ready, the General Assembly would normally decide on the convening of an international conference for the adoption of a

convention. This was the procedure that preceded the adoption of conventions, such as the four 1958 Conventions on the Law of the Sea, the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations and the 1969 Vienna Convention on the Law of Treaties. Sometimes, instead of convening an international conference, the ILC's draft would be discussed within the General Assembly Sixth (legal) committee and a convention would be adopted by the General Assembly itself. In short, a single basic text by the ILC served as the basis of negotiations.

In the case of the UNCLOS III, the preparatory work was not assigned to the ILC. Instead, UN General Assembly Resolution 2750 (XXV) requested the Sea-Bed Committee to prepare draft articles on the agenda items.

To explain why the ILC was excluded from the preparatory process of the sea-bed issue one should look at the UN member's view at that time. The debate in the First Committee, of the General Assembly, on the law of the sea question does not show that any serious consideration was given to this question. The records[52] show that many delegations spoke generally about the need for thorough preparatory work. China (Taiwan), for example, stated that it had originally informed the UN Secretary-General[53] that preparation should be entrusted in the first place to the ILC. But, at the General Assembly session, China (Taiwan) changed its position and agreed with the view that preparations be entrusted to a body other than the ILC.[54] When delegations did refer to the ILC, it was usually to point out that the 1958 Conventions had been preceded by arduous preparatory work by the ILC. Brazil, for example, pointed out that normally conferences of this kind "in

which legal texts are to be approved, have been finally decided upon by the General Assembly when the draft articles were already available and considered by the Assembly to constitute an adequate basis of work".[55] New Zealand also pointed out that the present situation differed from 1958. There were "original texts formulated in detail and in effect pre-negotiated over a long period, by the ILC".[56] In fact, the views of member states, also, did not contain any articulated reasons for the General Assembly's decision to entrust the preparatory work to the Sea-Bed Committee. The possible explanations for the General Assembly's decision to entrust the preparatory work to the Sea-Bed Committee and not to the ILC can be assumed in the following ways. Firstly, delegations had different kinds of reservations about the ILC. Some developing countries felt that the developing states were not adequately represented on the ILC. Others regarded the ILC as being too conservative. Yet others thought that the ILC's experience was mainly on the codification of international law and that it might not be suitable for making new law. Secondly, and probably the most important explanation, is that it was generally recognized that the questions at the UNCLOS III would not be purely legal. The issues involved political, economic, strategic, environmental and other considerations.[57] It was also realized that the work of the Conference would focus more on the progressive development rather than the codification of this branch of international law. Also, vital national interests were at stake, not only details. States were simply unwilling to leave the promotion of their vital interests to the ILC because they reasoned that only governmental representatives could effectively formulate solutions.

(d) The Third United Nations Conference on the Law of the Sea

The Third United Nations Conference on the Law of the Sea was, in the opinion of many, an unprecedented and unique law-making Conference. In no other similar conference have some 160 countries of the world participated. No other conference has had such a comprehensive and broad agenda. In no other conference were so many conflicting interests of different nations involved, and so many sensitive issues discussed. It is obvious that a conference of such importance, with such a wide scope of agenda and so complex and delicate a task, could not rely on the traditional structure, procedure and working methods of the international conference. What was required was a new procedure. The success of the conference in bringing about a broadly agreed upon convention after nine years of deliberation is to a great extent due to the presence of two qualities in its structure: procedure and working methods.

Before these aspects of the work of the Conference are briefly explained, it is appropriate to point out that, according to Resolution 3067 (XXVIII)[58] by the General Assembly on 16 November 1973, the Sea-Bed Committee was dissolved and the first session of the Conference, which was an organizational session, was convened in New York on December 1973. The second session, which was the first substantive session, was held in Caracas during 1974. In 1975, the third session was held in Geneva. The fourth and fifth sessions were held in New York, both in 1976. The sixth session was held in New York in 1977. In 1978, the seventh session and its

sub-sessions were convened in Geneva. The eighth session likewise comprised two sessions, one held in Geneva and the second in New York in 1979. The ninth sessions were held in New York and in Geneva in 1980. The tenth sessions were held in New York and in Geneva in 1981, while the eleventh and final session was held in New York in 1982. The Conference thus held a total of 11 sessions from 1973 to 1982.

1. The structure of the Conference

The structure of the Conference had a novel approach: alongside the official structure there existed an unofficial structure comprising different special interests groups which emerged in relation to the agenda of the Conference and informal private negotiating groups established by the initiatives of some delegates in their personal capacities. In the official structure, in addition to the Plenary, General Committee, Drafting Committee, Credentials Committee and three Main Committees with agenda inherited from the Sub-Committees of the Sea-Bed Committee, many informal working groups were established to facilitate negotiations in a more relaxed atmosphere and without keeping records. As regards the official structure, in addition to the plenary, which was allocated two items - peaceful uses of ocean space and enhancment of the universal participation of states in multilateral Convention relating to the Law of the Sea[59] - the Conference established three main committees. The agenda of the First Committee consisted of: (1) an international regime for the sea-bed and ocean floor beyond national jurisdiction, and (2) archaeological

and historical treasures on the sea-bed and ocean floor beyond the limits of national jurisdiction.[60]

H.S. Amerasinghe, who had served as the Chairman of the Sea-Bed Committee, was elected as the President of the Conference. He continued his function until his death in 1980, when he was succeeded by T.B. Koh from Singapore. P.B. Engo, as the chairman of the First Committee, continued to lead the negotiations on the legal regime of the deep sea-bed all through the Conference. With respect to the official structure of the Conference, special mention should be made of the Drafting Committee. This Committee had a very delicate and difficult task. Since the objective was to bring about a universally acceptable convention, it was necessary to produce equally authentic texts of it in all the languages of the United Nations. The innovation in order to achieve this goal was the creation of informal language groups which facilitated this task.[61]

Consequent on the large number of participants as well as the delicacy of the issues involved, the Conference showed a preference for utilizing small informal working groups which would be more efficient than plenary meetings of 160 delegations.[62]

A major part of the working of the Main Committees was carried out by these working groups which generally held informal meetings without records. The informal forums which were established to assist the First Committee included: a working group of 50 states in 1974 under the chairmanship of C.W. Pinto (Sri Lanka); a working group of the whole on the system of exploitation under J. Evensen (Norway) in 1972; three negotiating groups established by the Conference in 1978 as part of an effort to tackle

the hard-core issues before the Conference, comprising: Negotiating Group (NG) 1, chaired by F.X. Njenga (Kenya), dealing with the system of exploration and exploitation; NG2, under T.B. Koh (Singapore), dealing with financial arrangements relating to deep sea mining; NG3, chaired by P.B. Engo, dealing with the organs of the international Sea-Bed Authority; and finally, The Working Group of 21, established in 1978 and consisting of ten developing countries, seven Western industrialized countries, three members of the Eastern European Group and China, to resolve all the outstanding issues of the First Committee in a more limited forum.[63]

The other informal forums which were established by the Conference to assist the other Main Committees included: NG4, chaired by S. Nandan (Fiji), dealing with the problem of access of the land-locked and geographically disadvantaged countries to the living resources of the EEZ; NG5, chaired by C. Stavropoulos (Greece), dealing with the question of settlement of disputes in EEZ; NG6, chaired by A. Aquilar (Venezuela), dealing with the definition of the outer limit of the continental shelf; and NG7, chaired by E. Manner (Finland), dealing with the definition of maritime boundaries between adjacent or opposite coasts.

The results of the deliberations in the working groups were reported to the chairmen of the respective Main Committees who, in turn, included them in their own reports to the plenary. The function of the unofficial structure of the Conference was as significant as that of the official one. The unofficial structure included two kinds of grouping: special interest groups and informal private negotiating groups.

The emergence of special interest groups was a response to the demands which could not be fulfilled by the traditional groupings inside the United Nations system such as the regional groups; since most of the national interests involved cut across geographical groups or ideological lines.[64]

Some of the special interest groups included the Coastal States Group, the Land-locked and Geographically Disadvantaged States Group, Archipelagic States Group, Equidistance Line Group (for the delimitation of maritime zones), Equitable Principle Group and Great Maritime Powers Group.[65] The traditional interest groups of the United Nations, such as the regional groups, the European Economic Community (EEC), the Arab Group and the Group of 77 (G77),[66] could not function effectively, because of the diversity of interests of the members of these groups. For example, the G77, which consisted of over 120 developing countries, had divergent interests in matters related to the agenda of the Second and Third Committees, i.e. traditional subjects of the law of the sea as well as the preservation of the marine environment, and marine scientific research. But the G77 in relation to the question of the of the sea-bed area - the mandate of the First Committee - was united and the group acted effectively. The reason was that the interests of the industrialized countries with regard to technology for deep sea-bed mining were distinguishable from the interests of the developing countries which did not have such technology.

Looking back on the result of the work of the Conference, it is self-evident that, without these structural innovations, the task, if at all accomplishable, would have taken much more time to complete.

2. The methods of the Conference

A main concept attached to the work of the Conference was that of the package deal. The idea, as regards the law of the sea, was born in 1970, and was incorporated in the General Assembly Resolution 2750 (XXV) of the same year by referring to the close inter-relation of the problems of the ocean space.[67] In fact, it was a recognition of the dominant fact of the present time, namely, that the problems affecting the uses of the sea and the sea-bed could only be tackled jointly.[68] What was implied by a package deal was that all parts of the Convention should be considered as a single whole, negotiated and accepted as such, reflecting a balance of interests of all participating delegations and a result of many trade-offs.[69] This balance was to mean "the minimum interests of the largest possible majority while accommodating the essential interests of the major powers and the dominant interest groups".[70] A logical outcome of such a package deal is that no part of it can be selectively picked up while rejecting the other parts. It is also understood that, because of the package deal character of the Convention, it is not possible to claim rights under the Convention without being willing to shoulder the corresponding obligations.[71] Another implication of the package deal is that, since the Convention is an integral whole consisting of a series of compromises, no reservations or exceptions to it are allowed. A provision to the same effect is incorporated in the Convention.[72] The real success of the Conference was in allocating different subjects to many working groups without failing to sustain the package deal approach of the results which were ultimately embodied

in an integral whole. A package deal was a prerequisite characteristic for the Convention to obtain universal recognition.[73]

Another step taken by the Conference in order to achieve a result acceptable to all participating delegations was to choose consensus as the main decision-making procedure. The adoption of this method in a treaty-making conference was unprecedented,[74] but the task and the objectives of the Conference were in many ways unique. Although consensus procedure had been used even in the Sea-Bed Committee,[75] many developing countries were against it. They argued that the use of consensus would lead to protracted decision-making and would eventually disable the Conference. The industrialized countries, on the other hand, feared that the use of an automatic majority would allow the adoption of norms not acceptable to the considerable minority.[76] To reconcile these differing positions, the General Assembly, on 16 November 1973, approved a formula which is known as the Gentlemen's Agreement.[77] The Agreement, which was later appended to the Rules of Procedure of the Conference,[78] stated that the General Assembly:

> Recognizing that the Third United Nations Conference on the Law of the Sea at its inaugural session will adopt its procedure, including its rules regarding methods of voting, and bearing in mind that the problems of ocean space are closely inter-related and need to be considered as a whole and the desirability of adopting a convention on the law of the sea which will secure the widest possible acceptance, the General Assembly express the view that the conference should make every effort to reach agreement on substantive matters by way of consensus, that there should be no voting on such matters until all efforts on consensus has been exhausted. 79

The Conference subsequently decided that the determination as to whether all efforts in reaching consensus had been exhausted should be made by a two-thirds majority of the representatives present and

voting, providing that such a majority included the majority of the states participating in that session.[80]

One of the important features of the Convention is that all provisions contained in that instrument are adopted by consensus. Consensus in the case of the decisions of the Conference is defined as a general agreement without vote which does not necessarily mean unanimity.[81] The concept of consensus in the Law of the Sea Conference was described by the delegate of Cameroon when he said: "Consensus did not mean dictation by a small minority. It meant the addition of many small packages to form one large package of ideas which every member could accept albeit with some discomfort".[82] The general assumption of the term "consensus" in the United Nations' practice has been that: a minority of delegations that do not fully support a text are willing simply to state their reservations for the record, rather than insisting on voting against it. It does not necessarily mean a unanimity rule demanding the affirmative support of all participants, which would give a veto power to each one of them. It is, essentially, a way of proceeding without formal objection.[83] Nevertheless, it can be said that the text of the Convention represents a broad agreement among all participating delegates to the Conference. The procedural innovations in the form of a package deal, consensus and Gentlemen's Agreement were genuine measures which proved to yield most successful results, and would certainly set a procedural precedence for future global conferences.

3. The progress of work on the Conference

One of the most difficult procedural problems that the Conference faced was that, unlike the 1958 Conference on the Law of the Sea, which had as a basis for discussion draft articles prepared by the International Law Commission,[84] the UNCLOS III lacked any basic text for negotiation. What it had inherited from the Sea-Bed Committee was a vast mass of different proposals and a list of topics to be considered, but there did not exist any agreed upon text.[85] During the second session in 1974, when the greater part of the work of the Conference was devoted to general debate, a considerable number of proposals and draft articles were submitted by delegations. It was obvious that no meaningful discussion could be carried out without first producing a single preparatory text.

The problem was partly resolved in 1975, when the Conference decided to confer upon the chairmen of the Three Committees the task of each preparing an Informal Single Negotiating Text (ISNT).[86] These texts were to reflect the results of all informal and formal discussions held by them without prejudice to the position of any delegation. The texts so produced were revised by the same chairmen in 1976,[87] and the president of the Conference also took the initiative of preparing a Single Negotiating Text[88] on dispute settlement which was outside the agenda of the Three Main Committees. Because of the package deal considerations, real negotiations based on give and take principles could not be carried out without having a comprehensive integrated text comprising articles on all subjects on the agenda of the Conference. The Conference, therefore, recommended in 1976 that the President and

the chairmen of the Three Main Committees together would prepare a Single Composite Text.[89] This text was prepared in 1977 on the basis of all preliminary texts, the work of the three Main Committees and the formal and informal negotiating groups. The result, which was the Informal Composite Negotiating Text (ICNT),[90] was a decisive step towards the agreement on a comprehensive convention on the law of the sea. The Revised Composite Negotiating Text (RCNT)[91] was issued in 1979, followed by a second revision in the 9th session of the Conference in 1980.[92] At the end of the resumed 9th session in 1980, the Conference decided to raise the status of the RCNT to that of an informal Draft Convention.[93]

This document was still a negotiating text having an informal character. The official text of the Draft Convention[94] was released one year later in August 1981 with the many drafting changes and provisions concerning the seats of The Authority and The Law of the Sea Tribunal. Attributing the title "official text" to the Draft Convention, however, was not going to prevent the delegations from further negotiations on certain outstanding issues. The result of such negotiations, if entailing modifications supported by the majority in the Conference, could be incorporated in the Draft Convention.[95]

The final session of the Conference was devoted to negotiations on a few remaining issues including the establishment of the Preparatory Commission for the International Sea-Bed Authority and The International Tribunal for the Law of the Sea; the treatment to be accorded to the preparatory investment in deep sea mining activities made prior to the entry into force of the Convention and the question of participation by entities other than

states in the Convention. On the basis of the deliberations of the Conference, a set of changes for incorporation in the draft Convention was produced, and draft resolutions concerning the Preparatory Commission, pioneer investment and participation of entities other than states were prepared. After the acceptance of the new proposals in the plenary and their integration in the Draft Convention, the plenary decided that all efforts to adopt the Draft Convention by consensus had been exhausted,[96] and at the request of the representative of the United States,[97] a recorded vote was taken on 30 April 1982, and the Convention[98] together with four resolutions, all forming an integral whole, was adopted by 130 votes for, 4 against and 17 abstentions. The United States voted against the Convention because of dissatisfaction with Part XI concerning the regime of the deep sea-bed area. Israel, Turkey and Venezuela also cast negative votes, albeit for other reasons.[99] Abstentions belonged mostly to the industrialized countries of the West with particular interests in deep sea-bed mining in the area.

As we notice, the main problem of the lack of a basic text for the negotiations was resolved by the Conference through assigning certain officers to prepare such texts and revise them on the basis of deliberations carried out in different fora, and having the results checked and approved by the plenary. In retrospect, this proved to be a wise decision, and bearing in mind the number of participating delegations and the scope of the agenda, the result can be considered to be very successful.

As regards the international regime for the deep sea-bed area, two periods in the work of the Conference can be distinguished. The first period which lasted until 1976 was

characterized by disagreement on the issue by the G77, which supported a strong international organization with discretionary power over the activities in the sea-bed area, and some of the industrialized countries, which favoured the participation of the states parties to the Convention and their entities in those activities under a flexible international licensing system.

In 1976 the idea of the Parallel System was considered by the Conference. The core of the idea was to establish a system in which both the Authority, through its operating arm the Enterprise and the states parties to the Convention and public or private entities would engage in the activities of exploration for and exploitation of the sea-bed resources. From 1977 until 1982, the efforts of the G77 in supporting the Authority on the one side of the Parallel System and the industrialized countries on the other side were each focused on changing, as much as possible, the balance of interests which was to prevail due to the Parallel System, in its own favour.

The first negotiating text, the ISNT of 1975, provided for a strong international organization to control the activities in the area of the deep sea-bed. This pro-G77 position was somehow reversed in the 1976 RSNT in favour of the industrialized countries. The acceptance of the idea of the Parallel System, which was a compromise on the part of the G77, necessitated a modification in the negotiating text to strengthen the position of the Authority against other actors in the deep sea-bed area. The ICNT of 1977 was, therefore, more in favour of the G77. As from 1978, all negotiating texts that were produced more or less favoured the position of the industrialized countries. The adoption of

Resolution II by the Conference in 1982, which provides for the protection of pioneer investment and confers upon the pioneer investers exclusive right to some areas of the deep sea-bed, was another compromise by the G77 in favour of the industrialized countries. The result is that, in structuring the Parallel System[100] as the backbone of the regime of the sea-bed area in the Convention, the industrialized countries have succeeded in turning the balance in their own favour.

SECTION III: THE 1982 CONVENTION ON THE LAW OF THE SEA

The United Nations Convention on the Law of the Sea 1982, with respect to the scope of subjects it covers, is one of the most comprehensive international legal instruments ever worked out. Its importance exists not only in the breadth of its subject matter, but also in the fact that, unlike many other conventions, the provisions contained in it are directly negotiated, drafted and accepted by the official delegations of almost all sovereign states of the world.

The remarkable work comprises 17 parts consisting of 320 articles and 9 annexes with in total 103 articles. The Convention under some 25 titles covers almost all issues relating to human activities in the ocean space. The Convention is designed primarily to regulate the use of the oceans in time of peace and not in time of war or other armed hostilities. The first half of the Convention, containing the first ten parts, is generally devoted to the maritime zones under national jurisdiction, namely, the

territorial sea, the contiguous zone, the exclusive economic zone, and the continental shelf. The rules relating to the rights and duties of states in the high seas are also included in this part. The second part of the Convention, from Part XI to Part XVII, deals with more recent issues such as the regime of the Sea-bed Area, protection and preservation of the marine environment, marine scientific research and compulsory dispute settlement system. Part XI on the Sea-bed Area is by far the largest part of the Convention. It contains 59 articles, from Article 133 to Article 191, and lays down general principles relating to the Area beyond the limits of national jurisdiction (Articles 136-149), development of the resources of the area (Articles 150-155), the International Sea-Bed Authority (Articles 156-183) and settlement of disputes (Articles 186-191).

Out of nine annexes to the Convention, two are directly related to the question of the Sea-bed Area. Annex III, with 22 articles, sets forth the basic conditions for prospecting, exploration and exploitation; Annex IV contains the Statute of the Enterprise, the operating arm of the Authority. Moreover, the whole of Section 4 of Annex VI is devoted to the Sea-Bed Dispute Chamber which is a chamber of The International Tribunal for The Law of the Sea, and has exclusive jurisdiction over disputes arising from activities in the Sea-bed Area beyond national jurisdiction.

In addition to the nine annexes[101] of the Convention, there are six more annexes which are appended to the Final Act. The first of these annexes contains four resolutions which were adopted at the final session of the Conference. Resolution I concerns the establishment of the Preparatory Commission for the Authority and

the Law of the Sea Tribunal. Resolution II provides for the protection of the preparatory investments, in pioneer activities relating to polymetallic nodules.

Part XI, Annexes III and IV, and Resolutions I and II together constitute the Law of the Sea-bed Area as negotiated and agreed upon by the overwhelming majority of the nations of the world.

The Convention, which has not yet entered into force, was opened for signature on the last day of the final meeting of the Conference, 10 December 1982, in Montego Bay, Jamaica. On the same day, 119 delegations signed the instrument.[102] The Convention remained open for signature until 9 December 1984.[103] By March 1989, a total of 159 signatures as well as 37 ratifications were appended to the Convention.[104]

All industrialized countries of the West with special interests in the Sea-bed Area except the United States, the United Kingdom and the Federal Republic of Germany have signed the Convention. Sixty ratifications are required for the entry into force of the Convention.[105] The following chapter is concerned with the question of the limits of the Sea-bed Area before the United Nations fora.

Footnotes - Chapter One

1. For the details on Malta's proposal see Section II, note 17, infra, and the accompanying text of Chapter One as well as Section III (a) of Chapter Four.

2. For specific treatment, see Chapter Four on the concept of the common heritage of mankind.

3. For a detailed account on the Declaration of Principles, see Chapter Four, Section IV.

4. One of the main functions of the Preparatory Commission is drafting detailed rules, regulations and procedures relating to various organs of the Authority. The outcome of the efforts in preparing these rules, regulations and procedures will give the final shape to the limits of their powers and extent of their discretion.

5. A.L. Clark and J. Cook Clark, "Marine Metallic Mineral Resources of the Pacific Basin", 3 MRE, No. 1 (1986), pp. 45-62, at p.50.

6. See generally J.Z. Frazer, "Resources in Seafloor Manganese Nodules", in Kildow (ed.), Deep Sea Mining, pp.41-83. Cambridge: Massachusetts: The MIT Press, 1980.

7. See Clark, op. cit. and R.C. Ogley, Internationalizing the Sea-bed, p.8. Gower: Aldershot, 1984.

8. Clark, op. cit. Frazer, with respect to the insufficient information about manganese nodules and their location in the Clarion-Clipperton Zone, estimates the quantity of the nodules in the area to be something between 4 to 15 billion tons. Frazer, op. cit., p.58.

9. A. Post, Deep Sea Mining and the Law of the Sea, p.14. The Hague: Nijhoff, 1983.

10. L. Antrim, "The Role of Deep Sea-bed Mining in the Future Supply of Metals", in Kildow, op. cit., pp.84-104, at pp.87-88.

11. Antrim, ibid., p.89.

12. See, e.g., U.N. Doc. A/CONF.62/25, p.8.

13. M. Shafer, "Mineral Myths", 47 Foreign Policy (summer 1982), pp.154-81.

14. Post, op. cit., p.46.

15. Ibid., p.23.

16. B.J. Reddy and J.P. Clark, "Effects of Deep Sea Mining on International Markets for Copper, Nickel, Cobalt, and Manganese", in Kildow, op. cit., pp.107-123, at p.110.

17. Shafer, op. cit., p.157.

18. Reddy (ed.), op. cit., p.110.

19. See Clark, op. cit., p.66.

20. J.C. Burrows, "The Net Value of Manganese Nodules to U.S. Interests, with special reference to Market Effects and National Security", in Kildow, op. cit. pp.124-39, at p.124.

21. Manganese Nodules Mining Systems, p.2, The Technology Research Association of Manganese Nodules Mining System of Japan, Tokyo, March 1985.

22. J.T. Kildow and V.K. Dar, "Introduction to an Unusual Resource Management Problem", in Kildow, op. cit., pp.33-37, at p.21.

23. Progressive development is defined as "the preparation of draft Conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of states". See Statute of the International Law Commission, Article XV.

24. UN Doc. E/Res./1112 (XXI) 7 March 1966. Barry Buzan indicates that this "resolution was the first example of less developing countries as an organized group using the U.N. as a source of information which they could not obtain for themselves". See B. Buzan, Sea-bed Politics, p.66. New York: Praeger, 19 .

25. For Resolution 2172 (XXI) of December 1966 - Resources of the Sea - see UN Doc. A/Res./2172 (XXI), 1966.

26. See Resources of the Sea, UN Doc. E/4449, and Add. 1, 2, February 1968 and Marine Science and Technology: Survey and Proposals, UN Doc. E/4487, 24 April 1968. The aim of the ECOSOC is to serve as an organ promoting international economic and social cooperation. This organ was created as one of the six principal organs of the U.N. It consists of 54 members, all of whom are elected by the General Assembly for three year terms, with one-third of the terms expiring each year. The five permanent members of the Security Council have been regularly re-elected, and the developing countries are in the majority in the ECOSOC and can pass resolutions favourable to their own interests, since all measures are adopted by simple majority vote. In broad terms, the mission of the ECOSOC is to promote the welfare of all peoples everywhere. It meets twice annually. The

functions of the ECOSOC may be divided into three categories: (1) deliberation and recommendations in matters related to human rights, economy, education . . . etc.; (2) research and reports related to subjects within the scope of ECOSOC competence. These subjects constitute a primary source of data for governments and private research. (3) coordination through setting up priorities, eliminating duplication of effort and conflict of interest among agencies. These brief features of the ECOSOC are described in order to realize the significance of this organ within the United Nation system. For more information, see G. Schwarzenberger and E.D. Brown, A Manual of International Law, pp.242-248. Oxon: Professional Books Limited, 6th ed., 1976.

27. See United Nations General Assembly Document A/6695.

28. Resolution 2340 (XXII) is reproduced in M.H. Nordquist (ed.), United Nations Convention on the Law of the Sea, 1982, A Commentary, Vol. I, p.161. Dordrecht: Nijhoff, 1985.

29. These nations represented different regional groups such as seven from Africa, five from Asia, six from Latin America and eleven from Western Europe and others.

30. See UN Doc. A/7230, pp.1-2.

31. See Nordquist, op. cit., Vol. I, p.163.

32. See the names of these nations in ibid., p.169.

33. See UN Doc. A/C.1/L.473.

34. See, e.g., amendments submitted by Jamaica and Trinidad and Tobago, UN Doc. A/C.1/L.475.

35. Nordquist, op. cit., Vol. I, p.169.

36. Ibid., p.172, and see Yearbook of the United Nations, 1969, p.70; also see GAOR: 22nd session, First Committee, 1673rd-1678th Meeting, November 1, 1969.

37. For additional information on the Moratorium Resolution 1969, see Section I of Chapter Four.

38. Ibid.

39. This resolution is discussed in more detail in Chapter Four.

40. See B. Zuleta, Introduction to the United Nations Convention on the Law of the Sea. United Nations Publications, Sale No. E.83, V.5, p.XX, 1983.

41. Nordquist, op. cit., p.176.

42. Ibid., p.177.

43. Ibid., pp.178-182.

44. For the names of these nations, see ibid., p.181.

45. UN Doc. A/8421, pp.4-5.

46. Ibid., pp.30, 38.

47. UN Doc. A/8721, p.17.

48. Ibid., p.22.

49. T.G. Kronmiller, The Lawfulness of Deep Sea-bed Mining, Vol. I, p.51. New York: Oceana, 1980.

50. This paper was presented as a Report of Sub-Committee I in Appendix III of UN Doc. A/9021, Vol. II, pp.39-165.

51. C.A. Stavropoulos, "Procedural Problems of the Third Conference on the Law of the Sea" in Nordquist (ed.), op. cit., pp.lvii-lxv, at p.lxi. According to Article 13 of the United Nations Charter, the General Assembly in 1947 established the International Commission. It consists of 25 persons of eminent legal standing, nominated and elected by states, but serving in their personal capacity. On the basis of the work of the Commission, the United Nations adopted a number of conventions relating to the Law of the Sea and other subjects of international law. It has, however, devoted most of its efforts to codifying and developing the traditional subjects of international law, rather than areas where state practice is slight such as those where technology is making a major impact, or where the new and developing states have been demanding major changes such as in relation to economic development and power sharing. See A.E. Gotlieb, Impact of Technology on Contemporary International Law, 170 RDC (1981-I). The Hague: Nijhoff, pp.119-329, at pp.131 and 132.

52. 25 GAOR, First Committee (177th meeting, et seq.).

53. UN Doc. A/7925.

54. 25 GAOR, First Committee (1785th meeting, para. 51).

55. Ibid., 177th meeting, para. 117.

56. Ibid., 1786th meeting, para. 23.

57. See GA Resolution 2750C (XXV) in Nordquist, op. cit., pp.178-81, at 178 and 179. Preambular para. 5 of this resolution states that "political and economic realities, scientific development and rapid technological advances of the last decade have accentuated the need for early and progressive development of the law of the sea, in a framework

of close international co-operation".

58. See Nordquist, op. cit., Vol. I, pp.188-190.

59. See UN Doc. A/CONF.62/28.

60. Ibid. Under item 1, i.e. international regime, six sub-titles are specified. They are: 1- Nature and characteristic; 2- International machinery, structure, functions and powers; 3- Economic implications; 4- Equitable sharing of benefits bearing in mind the special interests and needs of the developing countries whether coastal or land-locked; 5- Definition and limits of the Area and 6- Use exclusively for peaceful purposes.

61. See Zuleta, op. cit., p.xxiii. The novelty of the working procedures of the Drafting Committee was in its three-level operations. On the first, there were the informal language groups. The results of their deliberations were discussed in a meeting of the co-ordinators of the groups and the chairman of the Drafting Committee (second level), and finally on the third level the Drafting Committee itself met. See I.D.M. Nelson, "The Work of the Drafting Committee", in Nordquist, op. cit., pp.135-152, at p.137.

62. Zuleta, op. cit., p.xxi.

63. See Tommy T.B. Koh and S. Jayakumar, "The Negotiating Process of the Third United Nations Conference on the Law of the Sea", in Nordquist, op. cit., pp.29-134, at pp.92-93.

64. Ibid., p.68.

65. Ibid., pp.70-81. See also A. Hollick, U.S. Foreign Policy and the Law of the Sea, p.403. New Jersey: Princeton University Press, 1981.

66. The group of developing countries has been referred to as "Third World countries", "less developed countries", or "under developed countries", but the title most often attributed to them in the course of negotiations on the Law of the Sea from 1967 to 1982 was "the Group of 77". The origin of this title is in the First United Nations Conference on Trade and Development (UNCTAD) in 1964, whose main commitment was to lay the foundation of a better world economic order. The basic problems of development which the developing and mostly newly independent states faced in the 1950s and the beginning of the 1960s drove them together to unify as a political force in order to preserve a common interest, i.e. a new policy for international trade and development. The original group at the 1964 UNCTAD comprised 77 developing countries, but the number has long passed over 100. The establishment of UNCTAD and the formation of the G77 and persistent demand for a New International Economic Order were against the will of developed countries. The G77

gradually expanded its scope of interest beyond UNCTAD to all other international organiza- tions, and to every issue of international concern. With this background, it is clear why the expression "G77" was so frequently used in the negotiations on the Law of the Sea. It should be emphasized, however, that the G77 which met at the UNCLOS III was distinct from the G77 in the General Assembly and other United Nations organs, because it had its own officials and working methods. See T.T.B. Koh, op. cit., pp.29-134, at p.81. For a more detailed account of the formation of the G77, see, e.g., M. Zammit Cutajar (ed.), UNCTAD and the South-North Dialogue, The First Twenty Years, pp.30-35. Oxford: Pergamon Press, 1985. See also Karl P. Sauvant, The Group of 77: Evolution, Structure, Organization. New York: Ocean Publication, 1981.

67. Preambular paragraph 4 of Resolution 2750 C (XXV) states that the General Assembly is conscious that the problems of ocean space are closely inter-related and need to be considered as a whole. See Nordquist, op. cit., pp.178-182. The same formulation is now in the third preambular paragraph of the Convention.

68. Statement of the Secretary-General at the 1974 Caracas Session. Off. Rec, Vol. I, p.38, para. 37.

69. J. Evensen, "Key Address", in The 1982 Convention on the Law of the Sea, Proceedings, Law of the Sea Institute Seventeenth Annual Conference, pp.xxvi-xxvii, at xxvii, Law of the Sea Institute: University of Hawaii, 1984.

70. Koh and Jayakumar, op. cit., p.40.

71. T.T.B. Koh, A Constitution for the Oceans, United Nations Publication, Sales No. E.83.V.5, pp.xxxiii-xxxvii, at p.xxxiv, 1983.

72. Article 309 of the Convention states: "No reservation or exception may be made to this Convention unless expressly permitted by other articles of this Convention."

73. For more details of the package deal, see Chapter Five, Section VI.

74. According to Stavropoulos, before UNCLOS III, the consensus procedure was "used mainly in regard to declarations, and only in highly special circumstances such as those pertaining to outer space questions, in regards to the formulation of treaty texts"; see Stavropoulos, op. cit., p.lxiv.

75. In fact, from the very beginning of the work of the Ad Hoc Committee, it had been decided that on any question agreement would be reached without the need for voting; see UN Doc. A/Ac.135/SR.1-9, p.8.

76. See Evensen, op. cit., p.xxvii.

77. The Gentlemen's Agreement was included in The Report of the First Committee to The General Assembly (A/9278, para. 16), and was adopted by the General Assembly on 16 November 1973 (A/PV.2169, para. 15).

78. UN Doc. A/CONF.62/30/Rev.3.

79. UN Doc. A/9278, para. 26.

80. Rules 37(1) and 39(1) of The Rules of Procedure, UN Doc. A/CONF.62/30/Rev.3.

81. According to Evensen, the definition of consensus in the Law of the Sea Conference was the "adoption of articles - and the text of the Convention as a whole - by general agreement (or understanding) without resorting to a vote and, in effect, without requiring a unanimous decision"; see Evensen, op. cit., p.xxvi.

82. Off. Rec., Vol. XIV, p.12.

83. See Stavropoulos, op. cit., p.lxiv.

84. See supra, note 51.

85. Stavropoulos, op. cit., p.lx.

86. Off. Rec., Vol. IV, p.26, paras. 92-95. The Informal Single Negotiating Text (ISNT) was issued as UN Doc.A/CONF.62/WP.8. This document had three parts corresponding to the subjects of the Three Main Committees. See Off. Rec., Vol. IV, pp.137-181.

87. UN. Doc. A/CONF.62/WP.8/Rev.1.

88. UN Doc. A/CONF.62/WP.9.

89. Off. Rec., Vol. VI, p.24, para. 33(ix).

90. UN Doc. A/CONF.62/WP.10.

91. UN Doc. A/CONF.62/WP.10/Rev.1.

92. UN Doc. A/CONF.62/WP.10/Rev.2.

93. UN Doc. A/CONF.62/WP.10/Rev.3/Add.1.

94. UN Doc. A/CONF.62/L.78.

95. UN Doc. A/CONF.62/114, reproduced in Off. Rec. Vol. XV, p.100; UN Doc. A/CONF.62/62, para. 10.

96. UN Doc. A/CONF.62/SR.174, p.13.

97. Off. Rec., Vol. XVI, p.154, para. 26.

98. UN Doc. A/CONF.62/122, later published as United Nations Publication, Sale No. E.83.V.5; also reprinted in ILM, Vol. 21, p.1261, 1982.

99. Israel, Turkey, the United States and Venezuela: Israel objected to observer status for the PLO. Turkey and Venezuela apparently preferred to resolve offshore boundary disputes with their neighbours before accepting the Convention. The United States objected to provisions regarding deep sea-bed mining.

100. See Chapter Five for more details.

101. Pursuant to Article 318, the annexes to the Convention form an integral part of the latter.

102. The signatories were the following: African Group 37 states, Asian Group 32 states, Eastern European Group 10 states, Latin American Group 22 states, Western European and Others Group 16 states and Namibia, represented by the United Nations Council for Namibia and the Cook Islands as a self-governing associated state with full competence to enter into treaties in respect of matters governed by the Convention also signed.

103. This date was established by Article 305(2) of the Convention.

104. The ratified states include the following: 1982- Fiji; 1983- Zambia, Mexico, Jamaica, UN Council for Namibia, Ghana, Bahamas, Belize, Egypt; 1984- Ivory Coast, Philippines, Gambia, Cuba, Senegal; 1985- Sudan, Saint Lucia, Togo, Tunisia, Bahrain, Iceland, Mali, Iraq, Guinea, Tanzania, Cameroon; 1986- Indonesia, Trinidad and Tobago, Kuwait, Yugoslavia, Nigeria, Guinea-Bissau Paraguay; 1987- Democratic Yemen, Cape Verde, Sao Tome and Principe; 1988- Cyprus, Brazil.

105. Article 308(1) of the Convention states: "This Convention shall enter into force 12 months after the date of the deposit of the sixtieth instrument of ratification or accession".

CHAPTER TWO

THE LIMITS OF THE INTERNATIONAL SEA-BED AREA

SECTION I: THE ISSUE BEFORE THE UNITED NATIONS

The question as to where to draw a line between national jurisdiction and the international zone beyond the limits of national jurisdiction is a hard-core issue for many states which participated in the Conference. According to Article 1 of the Convention the Area is defined as "the sea-bed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction".[1]

The interrelation between the outer limit of the area under coastal state jurisdiction and the boundaries of the deep sea-bed area became a focal point when the General Assembly established the Ad Hoc Committee in 1967, and entrusted it with the task of studying the peaceful uses of the sea-bed and the ocean floor beyond the limits of national jurisdiction. The general understanding was that landward of the area beyond the zone of national jurisdiction coincided with the seaward limit of the area of coastal jurisdiction. Since the new area was usually defined by reference to area of national jurisdiction, it was logical to establish the limits of coastal state jurisdiction.

When the Ad Hoc Committee started its work in 1968 many delegations put emphasis on the need to establish the limits between national jurisdiction and the international area. They demanded "an internationally acceptable definition of the precise limits of the area" beyond the limits of national jurisdiction, in order to be able to discuss any legal regime for that area.[2] An important reason of concern for the establishment of the precise limits of coastal jurisdiction was "the practice of an increasing number of

states in extending their jurisdiction in the form of licensing of exploration activities at great and increasing distance from their coast".[3] However, the view that the establishment of the limits of the area beyond coastal state jurisdiction is a necessary condition for negotiating a legal regime for that area was not shared by all participating delegations at the Ad Hoc Committee or Sea-Bed Committee. Some Latin American countries with claims of extended maritime zone generally opposed any consideration of the limits of national jurisdiction, and maintained that it was feasible to study the regime of management of the Area without previous determination of its boundaries.[4] Although the establishment of the limits of the Area was felt by a considerable number of delegations to be a prerequisite for an effective and useful negotiation on the legal regime, the direct relation of such limit with the outer limit of the area under coastal states jurisdiction had turned into a hard-core issue. The main problem was the coastal, and particularly the large maritime nations, could not agree on any limit for the coastal jurisdiction, before the nature and structure of the international regime and machinery for the sea-bed area were determined. For these states, therefore, the question of limits of coastal jurisdiction were to be treated after other related issues had been settled.[5] The issue, however, remained at the top of the list of topics before the Sea-Bed Committee, and in 1973 was transferred as an unsolved problem to the UNCLOS III.

Although attention was never taken off from the question of the limits of national jurisdiction, the greater part of the efforts in the Conference was devoted to the establishment of the legal regime for the Sea-bed Area.

In 1977, for example, the President of the Conference said:

> It should be borne in mind that the Conference had two main purposes. The first was to devise a regime for the exploration and exploitation of the sea-bed. . . . The second . . . was to review the existing body of international law of the sea, with a view to reaching general agreement on the limits and the nature of national jurisdiction. 6

Although the introduction of the concept of a 200-mile Exclusive Economic Zone (EEZ)[7] gave a new dimension to the question of the limits of coastal jurisdiction, its relation with the limits of the Area was only so far as the continental shelf[8] did not extend 200 nautical miles from the baselines of the territorial sea.[9] In this case the concept of EEZ had extended the jurisdiction of the coastal states in respect of management of resources both in the sea and on the sea-bed up to 200 miles from the coast. The real issue in the case of the international sea-bed area was to determine the outer limits of its connected sea-bed area, i.e. the continental shelf independent of the EEZ and in areas where the shelf exceeded the 200-mile distance from the coast. The criteria provided in the 1958 Continental Shelf Convention for the establishment of the outer edge of the shelf had proved to be ambiguous and uncertain.[10] The formula incorporated in Article 76 of the 1982 Convention for the determination of the outer limit of the continental shelf is the result of the effort to substantiate a difficult compromise among all diverging interests and is, by far, more complicated than its precedent in the 1958 Convention.

In the following pages, after a background of the interests of coastal states to the sea-bed and its resources and the interest of the United Nations with respect to the Sea-bed Area, the development

of the definition of the continental shelf and the content of Article 76 of the Convention will be dealt with.

SECTION II: THE ERA OF COASTAL STATES INTERESTS IN THE SEA-BED

(a) Background to the Interests Before 1945

Some basic facts should be first mentioned about the bed of the sea. The latter can be divided into broad areas: the continental margin and deep sea-bed.[11] The continental margins of the earth which are 175,000 kilometres long[12] usually consist of continental shelves, continental slopes and continental rises. The continental shelf begins at a low water mark from the shore line, and gently extends seaward to a point where an abrupt descent towards the ocean floor occurs. That is where the continental slope starts, and goes down towards the abyssal plains. The continental rise forms the base of the continental slope. Abyssal plains are the generally flat areas of the deep ocean floor which occupy nearly 40% of the submarine basins. They usually start at 3,000 to 5,000 metre depth. The deep sea-bed contains mountain ranges, ridges and deep trenches.

The technological revolutions and discoveries of oil and gas under the sea-bed urged the coastal states to rapidly extend their claims over areas of the sea-bed beyond the territorial sea. For this reason the doctrine of the Continental Shelf was born in 1945.

"Continental Shelf" as a geological term refers to the submarine continuation of land mass, from the shore to the first substantial fall-off on the seaward side. The fall-off usually occurs in depths between 130 to 200 metres. In some areas, the substantial fall-off never happens, and the geological continental shelf does not exist. Some examples are the North Sea between Great Britain and Denmark, the English Channel between Great Britain and France and the Arabian Gulf between the Arabian Gulf Co-operation Council States[13] and the Islamic Republic of Iran.

The first reference to the continental shelf in the present century seems to be in a memorandum of the Russian Government in 1916 concerning certain Arctic lands which were situated on the Asian coast of Russia, and formed a prolongation of the continental platform of Siberia.[14] The same claim was reaffirmed in 1924 by the Soviet Government in a memorandum to the United States. But as it became known later, the expression "continental platform" in those two memoranda was not used to signify the submarine platform, but rather was an application of the doctrine of appurtenance and contiguity,[15] or at least a variant of that "to support a claim to all the islands lying to the north of Russia".[16]

Another reference to the continental shelf was made in 1916 by a Spanish oceanographer, Oden de Buen, who believed that the rights of the coastal states in the territorial sea should be extended to the continental shelf in order to protect effectively the conservation of the fisheries.[17] Even here, continental shelf was not used in connection with the mineral resources of the sea-bed, but rather the fisheries in the sea.

The first instance where consideration of the mineral resources of the sea-bed beyond the territorial sea was expressly manifested was the agreement of 26 February 1942 between the United Kingdom, on behalf of Trinidad, which was then a British colony, and Venezuela in order to divide the submarine area of the Gulf of Paria.[18] This was the first under sea boundary agreement, and the first development of international prescription about the continental shelf.[19] However, the decisive event in state practice was the introduction of the doctrine of continental shelf by the United States in 1945.

(b) Truman Proclamations of 1945

On 28 September 1945, President Truman of the United States issued two proclamations,[20] one relating to fisheries in the high seas contiguous to the territorial sea of the United States and the second relating to the natural resources of the subsoil and sea-bed of the continental shelf of the United States. According to the first proclamation:

> . . . the Government of the United States regards the natural resources of the subsoil and seabed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control.

In the preamble to the proclamation, it was held that:

> . . .the Government of the United States, aware of the long range world-wide need for new sources of petroleum and other minerals, holds the view that efforts to discover and make available new supplies of these resources should be encouraged . . .

The proclamation was carefully written to avoid any conflict with the principle of the freedom of the high seas. Therefore, the character as high seas of the water above the continental shelf and the right of their free and unimpeded navigation are in no way thus affected. Although control and jurisdiction were claimed over the natural resources of the subsoil and not the sea-bed and subsoil itself, it was hard to imagine any control over the resources without control over the sea-bed and subsoil.[21] By stressing the jurisdiction over natural resources, the proclamation meant to prove that the United States did not plan to enclose the sea-bed of the continental shelf. On the other hand, the main legal basis of the claim was the argument that the continental shelf may be regarded as an extension of the land mass of the coastal state and thus naturally appurtenant to it. By this argument, the proclamation rejected the legal status of the continental shelf either as res communis or res nullius.[22] This also shows that, although the main interest was the mineral resources, they could not be brought under control unless the sea-bed was considered as the natural prolongation of the land mass, and because of this, under the coastal state's jurisdiction. Hence, the Truman Proclamation, while keeping the status of the superjacent waters as high seas, took a significant step toward giving a large area of the sea-bed to the coastal states.

In the cautious words of the proclamation "jurisdiction" and "control" were preferred to "sovereignty" in order to affirm that the United States had not extended its sovereignty beyond the territorial sea, and the new claim related only to some limited rights.[23] Some writers, however, have argued that there is actually

no distinction between "jurisdiction" and "exclusive control" and "sovereignty". Lauterpacht, for example, is of the opinion that:

> an area which is under the state's exclusive control and jurisdiction, not delegated by or accountable to a foreign government or authority, is under the sovereignty of that state. An area declared henceforth within the exclusive jurisdiction and control of a state becomes part of its territory. 24

The Truman Proclamation did not establish any width for the continental shelf but a United State government, in a press release accompanying the proclamation, stated, inter alia, that "the U.S. generally viewed the submerged lands contiguous to the continent and covered by no more than 100 fathoms (600 feet) of waters as the continental shelf".[25] The choice of this depth seems to have been an effort to adapt the legal definition of the continental shelf on the geological definition of the term. Although some countries had a negative attitude towards the United States' unilateral extension of sea-bed resource distribution, there was no official objection to the Truman Proclamation. On the contrary, some countries resorted to unilateral proclamations for the purpose of extending their maritime jurisdiction. From 1945 until 1958, the declarations of coastal claims over the adjacent submarine areas, according to the Truman Proclamation, increased to a large number,[26] but there was no uniformity in either the type of authority the claiming states sought to exercise or the extent of the area claimed.[27] While the Truman Proclamation spoke of control and jurisdiction over the resources of the sea-bed, some of the following declarations claimed sovereignty or sovereign rights, and, in some cases, not only over the submarine area, but also over the superjacent water. The Truman Proclamation and declarations of the Arabian Gulf states were

concerned with oil and other mineral resources of the shelf,[28] but all Latin American declarations were primarily based on the interests of those states and on the preservation of the living resources of their adjacent seas.

Almost half of these declarations contained a certain depth (usually 200 metres) as the outer limit of their claimed areas, while the rest, like those of the Arabian Gulf states which have shallow shelves or no shelf at all, or some states on the Western coast of Latin America with steep shelves, did not define the outer limits of their shelves.[29]

Many of the claims were not limited to the sea-bed and its resources, but extended to the living resources of the superjacent waters.[30] Although these claims were not accepted by other states, and in some cases were even officially protested against,[31] some of the claiming states enforced their jurisdiction at least in respect of fisheries, and this generated many international contentions.[32]

A few years after the Truman Proclamation, the doctrine of the continental shelf had received such widespread support in the practice of states that some authors considered it already a part of customary international law. However, there were other writers who could not share this view. Lauterpacht, for example, wrote:

> the various proclamations . . . relating to the continental shelf constitute, in the language of Article 38 of the Statute of the ICJ, international custom as evidence of a general practice accepted as law. 33

Others such as the arbitrator of the Abu Dhabi case (Lord Asquith of Bishopstone) had another view. He, in 1951, acted as an umpire in the case of the Sheikdom of Abu Dhabi and the Tricial Coast Company in Paris.[34] In this case, the arbitrator decided that the

continental shelf doctrine has not yet assumed the hard lineaments or the definitive status of an established rule of international law.[35]

Until 1950, when the ILC started its work on the codification of the law of the sea, there were few comments from Western European States or the Soviet Union on the development of the doctrine of continental shelf.[36] One of the first writings about the subject in the Soviet Union was an article in 1950 written by V.M. Koretskii in which postwar claims to the continental shelf were surveyed. The writer in this article, "A new development in the division of the High Sea", was very critical and complained: "Sea spaces are usurped and are transformed into 'national interests'" or "America declares, satellites follow, science recognizes and a norm is born".[37] Generally speaking, the Soviet Union had a vague policy about the sea-bed, and this policy continued for rather a long time.

(c) The Work of the International Law Commission

With regard to the evident necessity to define the contents and limits of the claims of states to the continental shelf, the ILC, in its first session in 1949, decided to give priority to the codification of the regime of the high seas. J.P.A. Francois, as the Special Rapporteur, was charged with the task of preparing a report on the subject. Discussion on the basis of this report started in 1950. The main objective of the ILC was to work out a definition with due regard to the geological fact that depth criterion alone could be prejudicial to the case of many states, and

stressing the existence of the geological continental shelf as the basis of rights might deprive some other states from those rights.[38]

As a result of deliberations in 1950, the ILC came to the conclusion that:

> . . . a littoral State could exercise control and jurisdiction over the seabed and subsoil of the submarine areas situated outside its territorial waters with a view to exploring and exploiting the natural resources there. The area over which such a right of control and jurisdiction might be exercised should be limited; but, where the depth of the waters permitted the exploitation, it should not necessarily depend on the existence of the continental shelf. The Commission considered that it would be unjust to countries having no continental shelf if the granting of the right in question were made dependent on the existence of such a shelf. 39

The discussion in the 1951 session resulted in the adoption of almost the same formulation as the year before in the form of a draft on the definition of the continental shelf. It was thus defined as:

> The seabed and subsoil of the submarine areas contiguous to the coast, but outside the area of territorial waters, where the depth of the superjacent waters admits of the exploitation of the national resources of the seabed and subsoil. 40

This definition and its exploitability clause was criticized by many countries and a fixed limit of 200-metre isobath was generally supported.[41] In response to the criticism, the ILC adopted in 1953 the 200-metre depth limit instead of the exploitability criterion, and explained this change of view by arguing that exploitability, being an uncertain and imprecise concept, would give rise to disputes.[42] In the 1953 session of the ILC, a rather long discussion was held on the nature of the coastal state's rights on the continental shelf, and those members who supported "sovereignty" or "sovereign rights" succeeded in excluding "jurisdiction and control" from the text before the Commission.[43]

The question of continental shelf was not raised in the ILC until the eighth session in 1956. In the same year, the Inter-American Specialized Conference on Conservation of Natural Resources: the Continental Shelf and Oceanic Waters, organized by the Organization of American States, was held in Ciudad Trujillo in the Dominican Republic. This conference adopted a resolution on the rights of the coastal states to exploit the resources of the sea-bed and subsoil. It said:

> The seabed and subsoil of the continental shelf, continental and insular terrace, or other submarine areas, adjacent to the coastal state, outside the area of the territorial sea, and to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the seabed and subsoil, appertain exclusively to that state and are subject to its jurisdiction and control. 44

Garcia Amador, Chairman of the ILC in 1956, who had participated in the Dominican Conference as the Cuban delegate, brought this new definition to the ILC, and suggested modifications in the 1953 definition of the continental shelf be accepted to reformulate the definition as follows:

> For the purpose of these articles, the term "continental shelf" is used as referring to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres (approximately 100 fathoms) or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said area. 45

The reintroduction of the exploitability criterion gave rise to long discussions, but it was finally adopted by the Commission. It should be pointed out that the term "adjacent" was added to the ILC definition of the continental shelf to confirm that the application of the exploitability test was qualified by the condition of "adjacency", and the criterion should be used together with the

"adjacency" condition. In other words, "the extent of the coastal states rights was limited by a notion of adjacency in the sense of 'nearness', 'proximity'".[46]

In 1956, the ILC retained Article 2 of the 1953 Draft Articles on the Continental Shelf, which recognized the sovereign rights of the coastal state strictly for the purpose of exploring and exploiting the natural resources of the seabed of the continental shelf, and thereby refused any claims of sovereign rights over the sea-bed of that area. The question of the continental shelf was not solved in the ILC. Thus, the final report of the ILC in 1956 on the regime of the high seas, including the continental shelf, was submitted to the General Assembly, and subsequently became the basis of the negotiations at the First UNCLOS in 1958.

(d) The 1958 Continental Shelf Convention on the Law of the Sea

The General Assembly, in its eleventh session, by Resolution 1105 (XI) of 21 February 1957, approved the convening of the United Nations Conference on the Law of the Sea, in order to study the 1956 ILC report on the law of the sea as the basis for consideration of the problems involved in the development and codification of the law of the sea.[47] The Conference was held from 24 February to 27 April 1958, with a total of 86 participating states. Committee IV of the Conference, charged with the task of studying the rights of coastal states on the continental shelf, during 30 meetings reviewed Articles 67 to 73 of the Draft Articles on the law of the sea

prepared by the ILC. The Convention on the Continental Shelf, which was adopted at the end of these discussions, is in both substance and form very much like the Draft Articles prepared by the ILC. Article 1 of the 1958 Convention on the Continental Shelf states:

> For the purpose of these articles, the term "continental shelf" is used as referring (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said area; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands. 48

While the 200-metre depth criterion was generally accepted at the Conference, the exploitability test was challenged. Some delegations maintained that this criterion was both vague and subjective, for it was not clear if the technical capability of one state or of all states was to be considered in order to judge what was technically possible.[49] Some writers later claimed that the exploitability clause in Article 1 of the Continental Shelf Convention should be interpreted objectively, i.e., the interpretation should be based on the capabilities of the most technologically advanced country which "expands the outer limit of the continental shelf for all states as it develops its own shelf at ever-greater depth".[50] Some other scholars, criticizing the exploitability criterion, argued that, by applying the rules of Article 1, the whole sea-bed of the world will be divided between a few coastal states. They believed the exploitability test did not recognize any limits, and even if it were interpreted objectively, the technological progress of a state would extend its national area in the seas to the middle of oceans where the area might be

separated by a median line from the national area of another coastal state on the other side of the ocean.[51]

Those who were in favour of the exploitability test put much weight on the term "adjacent". This term, in their view, was inserted in Article 1 to make a distinction between the submarine areas, which constituted the natural prolongation of the land mass with almost the same geological features, and the deep ocean floor.[52] The term "adjacent", however, was vague and had a rather relative content subject to a flexible interpretation and, as such, lacked the precision which was required for the determination of the outer limit of the continental shelf.[53]

Article 2 of the 1958 Convention on the Continental Shelf enumerated the rights of the coastal states over the natural resources of the continental shelf. According to that article: "The coastal state exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources". Like in the ILC, in the 1958 Conference, too, many discussions were held as to the applicability of "sovereignty", "jurisdiction" or simply "rights" instead of "sovereign rights".[54] Some Latin American states, basing their argument on the Truman Proclamation, invoked the natural prolongation argument, and claimed the same rights for the coastal state in the continental shelf as it enjoyed in the mainland, i.e. sovereignty.[55] Those who strongly opposed the term "sovereignty", feared that this term, redolent of territorial sovereignty and three-dimensional control, would prejudice the status, as high seas of the waters over the shelf.[56] "Sovereign rights", however, was adopted as a compromise. The 1958 Convention on the Continental Shelf was an effort to codify the

principles already laid down in the Truman Proclamation. These principles were incorporated in the first three articles of this Convention, which contained the definition of the continental shelf, the nature of rights of the coastal states in that area and the subjects of these rights. It is said that the 1958 Conventions[57] reflect "synthesized views of the developed, maritime Western World".[58] This statement might seem more acceptable with regard to the "moderate and modestly conservative attitude" of the Soviet Union both at the ILC and the 1958 Conference,[59] and the under-representation of the developing countries in that Conference.[60] In fact, the doctrine of continental shelf was to bring the submarine oil and gas reserves under the control of the coastal state. The definition of the continental shelf in Article 1 of the 1958 Convention would serve this purpose perfectly. Indeed, some writers believe that the imprecision of the definition by the inclusion of the exploitability clause was intentional.[61] Towards the middle of the 1960s, the information gathered about the existence of other mineral resources, namely, polymetallic nodules, on the bed of the oceans gave a new dimension to the sea-bed question. An increasing number of newly independent states in Asia and Africa, which were generally poor and had no influence on the work of the first two conferences on the law of the sea, expressed their dissatisfaction with the existing law of the sea and emphasized the need for the revision of that law. The definition of the continental shelf, which had only one aspect in connection with the right of coastal states, acquired a new dimension, and that was in connection with the rights of the international community over the sea-bed beyond the continental shelf. This new aspect

inevitably necessitated the working out of a precise and clear definition of the outer edge of the continental shelf.

Before the developments with respect to the world community interest and their impact on the definition of the continental shelf, and the establishment of its outer limit, are followed, we should deal with an important case which had a strong effect on the later developments of the concept of the continental shelf: the North Sea Continental Shelf cases.[62]

(e) The North Sea Continental Shelf Cases

These cases were concerned with two continental shelf boundary disputes between the Federal Republic of Germany on the one side and Denmark and the Netherlands on the other. The three countries started their negotiations for the delimitation of their respective continental shelves in 1962. The result of more than two years of negotiations was the determination of two partial boundaries in the immediate nearness of their coasts. The continuation of the negotiations, however, could not solve the problem of the rest of the boundaries. On 16 February 1967, the three states submitted their disputes to the ICJ and asked the Court to decide:

> What principles and rules of international law are applicable to the delimitation as between the parties of the areas of the continental shelf in the North Sea which appertain to each of them beyond the partial boundary [already] determined . . . 63

The Federal Republic of Germany, which had signed but not ratified the 1958 Convention on the Continental Shelf, contended that the correct rule to be applied was to give the states concerned a just and equitable share of the continental shelf.[64] Denmark and

the Netherlands, on the other hand, contended that the delimitation should be made with respect to Article 6 of the 1958 Convention,[65] which in their opinion, contained a mandatory rule of law.[66] The Court noted that as the Federal Republic of Germany was not a party to the 1958 Convention, Germany had no obligation to apply Article 6. So it was for the Court to decide which rules of international law could be applied for the delimitation in question. The Court refused to accept the German claim, and stated that:

> . . . the doctrine of the just and equitable share appears to be wholly at variance with what the Court entertains no doubt is the most fundamental of all the rules of law relating to the continental shelf, enshrined in Article 2 of the 1958 Geneva Convention, though quite independent of it - namely that the rights of the coastal state in respect of the area of the continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist ipso facto and ab initio, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources. In short, there is an inherent right. In order to exercise it, no special legal process has to be gone through, nor have any special legal acts to be performed. 67

The Court in many parts of its judgement, as in the preceding passage, emphasized the notion of natural prolongation as the main factor in conferring title on the coastal state. In the language of the Court:

> The doctrine of continental shelf is a recent instance of encroachment on maritime expanses which, during the greater part of the history, appertained to no-one. The contiguous zone and the continental shelf are in this respect concepts of the same kind. In both instances the principle is applied that the land dominates the sea. 68

Both Denmark and the Netherlands claimed that the test of appurtenance had to be "proximity" or "closer proximity" in the sense that all those parts of the shelf which were closer to a particular coastal state than any other point on the coast of another state, were appurtenenant to the former and only an

equidistant line would leave to each one of the states concerned those areas that were nearest to its own coast.[69] The Court, in opposing this claim, maintained that "vague . . . terminology . . . such as . . . 'near', 'adjacent to' . . . all of them are terms of a somewhat imprecise character . . .". It continued:

> . . . by no stretch of imagination can a point on the continental shelf situated say a hundred miles, or even much less, from a given coast, be regarded as "adjacent" to it, or any coast at all, in the normal sense of adjacency, even if the point concerned is nearer to one coast than to any other. 70

The Court observed that adjacency is not always identical with proximity. As a conclusion to this argument, the Court pointed out:

> More fundamental than the notion of proximity appears to be the principle . . . of the natural prolongation or the continuation of land territory and domain, or land sovereignty of the coastal state, into and under the high seas, via the bed of its territorial sea, which is under the full sovereignty of that State. There are various ways of formulating this principle but the underlying idea, namely of an extension of something already possessed, is the same, and it is this idea of extension which is in the Court's opinion determinant. 71

Although these cases were concerned with the determination of continental shelf between three adjacent states, the conclusions reached by the Court were immediately extended to the cases of determination of the outer limit of the continental shelf when the coastal state fronted on the open ocean. The concept of natural prolongation as sanctioned by the court influenced the negotiation at the Sea-Bed Committee and the UNCLOS III and was finally integrated in the new definition of the continental shelf.[72]

SECTION III: THE ERA OF THE UNITED NATIONS INTERESTS IN THE SEA-BED AREA

The proposal of Malta to the 22nd session of the General Assembly in 1967 is a turning point in the history of claims to the sea-bed and its resources, and a document that may be as significant as the Truman Proclamation. By that proposal, the sea-bed and subsoil thereof beyond the limits of national jurisdiction, together with their resources, were claimed to be the common heritage of mankind.[73] The claim and the introduction of mankind as holder of rights in the area of the deep sea-bed allowed the determination of the precise outer limit of the continental shelf to be treated as urgent.

(a) The Sea-Bed Committee

When the Ad Hoc Committee convened in 1968, the view of the majority of the delegations was that Article 1 of the 1958 Convention on the Continental Shelf embodied the existing customary law on the subject, but those who opposed the exploitability clause suggested the revision of that article.[74] Still others objected to any discussion on the subject either, like Latin American countries fearing to lose the rights they had presumably gained by the 1958 Convention[75] or claiming that the question of the outer limit of the continental shelf was not within the mandate of the Ad Hoc Committee.[76] When the question of the limits of national

jurisdiction was raised in 1969, some delegations argued that this question could be sufficiently determined in the case of the continental shelf by using the combined elements of "adjacency" and "exploitability" contained in Article 1 of the 1958 Convention on the Continental Shelf which embodied a principle of customary law.[77]

Other delegations were of the opinion that the question of the nature of the regime to be established for the exploitation of the sea-bed beyond the limits of national jurisdiction was related to the question of the limits of the area where it was to be applied and, therefore, progress could only be achieved if both the questions were dealt with immediately.[78] In 1970, Malta submitted a draft resolution to the General Assembly stating that, in order to preserve the deep sea-bed from violation which could be caused as a result of the uncertainty of the definition of the continental shelf, a conference should be held, meeting at an early date to arrive at "a clear, precise and internationally acceptable definition of that area of the deep ocean floor".[79]

According to this and other proposals, the General Assembly on 15 December 1969 adopted Resolution 2574 (XXIV) which stated, inter alia, that since:

> the definition of the continental shelf contained in the Convention on the Continental Shelf of 29 April 1958 does not define with sufficient precision the limits of the area over which a coastal state exercises sovereign rights . . . [the General Assembly requests] the Secretary-General to ascertain the views of member states on the desirability of convening at an early date a conference on the law of the sea to review the regime of the continental shelf. 80

Moreover, the UNCLOS III initially was called to draw a line between a national continental shelf and the international zone beyond the limits of national jurisdiction. In fact, this issue has not been easy for the Conference to solve. Outside the United Nations

forum, in 1970, President Nixon of the United States proposed that:

> all nations adopt as soon as possible a treaty under which they would renounce all national claims over natural resources of the seabed beyond the point where the high seas reach a depth of 200 meters (218.8 yards). 81

The General Assembly in its Resolution 2750 C (XXV), in 1970, decided to convene in 1973 a conference on the Law of the Sea which would deal, inter alia with the precise definition of the area of the seabed beyond the limits of national jurisdiction.[82]

During 1971, the Sea-Bed Committee established three sub-committees. Because of the significance of the determination of the precise limits of the national jurisdiction and the disagreement among the delegates about the priority of the subjects, it was decided that this question be allocated to the Main Committee, while at the same time all the three sub-committees, in addition to their own mandate, might consider that question too. The discussions in this year, although extensive and lengthy, did not yield any solution to the problem.

The introduction of the concept of EEZ gave a new dimension to the negotiations at the Sea-Bed Committee. In the Main Committee, a document was submitted by eleven countries,[83] which requested the Secretary-General to make studies on the different economic implications of the various proposals for the establishment of the outer limit of the continental shelf. Five limits were suggested in that document: 200 metre isobath, 500 metre isobath, 40 nautical miles from the coast, 200 nautical miles and the edge of the continental margin.

The 1973 sessions of the Sea-Bed Committee were engaged with the preparation for the convening of the UNCLOS III. In the consolidated alternative texts prepared on the basis of different

suggestions, two main alternatives were mentioned for the determination of the outer limit of the continental shelf. They were the outer edge of the continental margin and the Soviet proposal of a 500 metre isobath or 100 nautical miles from the coast.[84]

Before we embark upon the study of the definition of the outer limit of the continental shelf in Article 76 of the Convention, it is appropriate to mention, in brief, the introduction of the concept of the Exclusive Economic Zone which resulted in a considerable reduction of the size of the sea-bed area beyond the limits of national jurisdiction.

(b) The Exclusive Economic Zone Concept

Although some Latin American countries already had claims of 200-mile territorial sea, and some other countries were addressing in the Sea-Bed Committee the question of preferential fishing rights of the coastal states,[85] the new and a sui generis concept of the EEZ as a compromise between the extreme claim of 200-mile territorial sea and the modest claim of preferential fishing rights was first introduced, in a formal document, by the Kenyan delegation to the Sea-Bed Committee in 1972.[86] In its "Draft articles on exclusive economic zone concept" Kenya had proposed that all states should exercise sovereign rights over the natural resources of the EEZ, living and non-living, either within the water column or on the sea-bed and subsoil thereof. The limit of the EEZ was suggested not to exceed 200 nautical miles. It was also envisaged that neighbouring developing land-locked or geographically disadvantaged

countries should be permitted, according to regional arrangements, to exploit the living resources of the coastal state's EEZ.[87]

Except for some maritime powers with far distance fishing industries, such as the Soviet Union and Japan, the concept of EEZ gained general support in the Sea-Bed Committee, though many developed countries could not approve the legal content of the concept as formulated by Kenya. The statements of different delegations at the first substantive session of the UNCLOS III in 1974 was evidence of the fact that a consensus in favour of the creation of the EEZ was within reach.

Negotiations in the UNCLOS III, which led to some modifications concerning the rights of other states in the EEZ, paved the way for the integration of this concept in different versions of the UNCLOS III negotiating text and finally in the Convention itself. Moreover, the practice of the majority of states in the form of issuing declarations or enacting legislation for the establishment of the EEZ transformed this concept, quite separate from the Convention, into a part of customary international law.[88]

The outcome of the adoption of the EEZ as part of the new law of the sea was that both the area beyond the limits of national jurisdiction and its resources, which were the common heritage of mankind, were reduced considerably from what they were at the time of the adoption of the Declaration of Principles.[89]

Another factor which contributed to the reduction of the initial size of the sea-bed area beyond the limits of national jurisdiction was the definition of the outer limit of the continental shelf in Article 76 of the Convention. This development of Article 76 is the subject of the following pages.

In the early discussion on the conference, many developing countries were in favour of keeping the distance criterion of 200 miles for the determination of the outer limit of the area of national jurisdiction of the sea-bed and opposed any recourse to the geomorphological definition of the continental shelf.[90] There were, however, many other countries, both developing and developed, which supported further extension even up to the edge of the continental margin.[91]

In 1975, when the Chairmen of the Three Main Committees of the Conference were assigned to each prepare a single negotiating text, the text of the Second Committee defined the continental shelf of the coastal states as:

> . . . the sea-bed and subsoil of the submarine areas that extends beyond its territorial sea throughout the natural prolongation of land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baseline from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance. 92

There was no agreement on the continental shelf jurisdiction beyond 200 miles, but Article 69 of the ISNT provided that the coastal state should make payments or contributions in kind in respect of the exploitation of the non-living resources of the continental shelf beyond 200 nautical miles. Many delegations believed that the outer limit of the continental margin, when beyond 200 miles, should be precisely defined. In that case, and provided it was coupled with revenue sharing, a general agreement about the outer limit of the continental shelf should be worked out.[93] In the RSNT of 1976 there was no change in the definition of the continental margin and the method of revenue sharing for that part of the margin which lay beyond the 200-mile distance was retained.

In the fourth session of the Conference in 1976, Ireland, in an informal meeting of the Second Committee, submitted an informal text containing a formula, known as the Irish Formula, having regard to the relation between the oil reserves and the thickness of the sedimentary rocks on the ocean floor,[94] and had therefore related a one per cent of the thickness of those rocks with their distance from the base of the continental slope.[95] Because of its complexity, the formula could not be included in the RSNT, and the Chairman of the Second Committee considered it necessary to establish a group of experts to study it further.[96] In the fifth session of the Conference in 1976, the Irish proposal was discussed for the first time. The question of sharing the revenues derived from the exploitation of the resources of the continental shelf beyond 200 miles was given more consideration in this session, but no concrete result was achieved. Support for the Irish Formula increased in the sixth session in 1977, but the Chairman of the Second Committee refused to include it in the ICNT, because he considered it unjustifiable at that stage.[97] When in 1978 the Conference decided to establish seven negotiating groups to discuss the hard-core issues, Negotiating Group 6 was charged with the task of finding solutions to the question of the definition of the outer limit of the continental shelf and revenue sharing. In this session, the Soviet Union proposed that the outer limit of the continental shelf be set at a maximum 300 miles from the baseline, i.e., 100 miles beyond the limit of the EEZ.[98] The proposal was extensively discussed in Negotiating Group 6. There was strong opposition to the Soviet proposal by the developing countries, which supported the maximum distance of 200 miles from the baseline.

By then, three principal ideas in regard to the determination of the outer limit of the continental shelf had emerged: 1- the majority of states which favoured a 200-mile limit for the EEZ and the continental shelf; 2- an active minority of states with broad margins which supported the extension of the limit to the outer edge of the continental margin; and 3- the Soviet Union, which suggested a combined criterion of depth and distance.[99] In 1979, several new informal proposals concerning the determination of the outer limit of the continental shelf were submitted to Negotiating Group 6.[100] The problem at this stage was that the 300-mile limit alone could not cover all submarine areas of coastal interest to broad margin states.[101] The Soviet Union came up with a solution by amending its original proposal, this time suggesting the maximum limit at a distance of 60 nautical miles beyond a 2500-metre depth. A compromise formula emerged within Negotiating Group 6 by employing that alternative criterion of 350 nautical miles from the baseline or 100 miles from the 2500 metres, which ever was further seaward.[102] In the second part of the eighth session of the Conference in 1979, in addition to the questions of definition of the continental shelf and revenue sharing, some other issues such as the question of submarine oceanic ridges and the problemo of Sri Lanka were touched upon. As regards the submarine ridges, it was the opinion of some delegates that these ridges could be used for the extension of the continental shelf. Although some proposals about the determination of the outer limit of the continental shelf in areas with submarine ridges were submitted to the NG6, further consideration of the question was deferred to the next session. In the first part of the tenth session in 1980, the United States, the

Soviet Union and some broad margin states had several informal meetings about the problem of submarine ridges. Their negotiations were finally completed successfully, and a compromise formula was produced. According to this formula, firstly, the continental margin does not include the deep ocean floor with its oceanic ridges, and secondly, when there are oceanic ridges, only the criterion of distance, i.e., 350 miles from the baselines, should be applied, "even though the Irish formula might otherwise place the limit of the continental margin further seaward".[103] These two provisions were included in paras. 3 and 6 of Article 76 of the second revised text of the ICNT which was issued at the end of the first of these sessions. The broad margin states, however, insisted that there should be a distinction between oceanic ridges and submarine elevations which were natural components of the continental margin, such as rises, caps, banks and spurs. They argued that in the case of these elevations both the distance (350 miles) and depth (2500-metre depth plus 100 miles) should be applied.[104]

These modifications brought about a definition of the continental shelf which was more or less considered adequate for the determination of the outer edge of the continental shelf. Nevertheless, it was difficult to say that the definition was an expression of opinio juris of the participating states at the Conference.[105] In the light of this development, the developing states which insisted on a 200-mile limit, eventually showed willingness to accept the agreed formula. The definition of the continental shelf as agreed in the tenth session, and included in

the second revision of the ICNT, was finally integrated in Article 76 of the Convention.

The question of revenue sharing was settled by a compromise which is enumerated in Article 82 of the Convention. Under the provision, the sovereignty of a coastal state is restricted to its continental shelf. The coastal state has an obligation to make payments or contributions in kind in respect of the exploitation of the non-living resources of the continental shelf beyond 200 nautical miles. The payments are to be made to the Authority, which shall distribute them to states parties on the basis of the equitable sharing criteria, taking into account the needs and interests of the developing countries. The payments may amount to up to 7 per cent of the value or volume of the production. If the coastal state is a developing state and net importer of one of the minerals produced from the area in question, that country is exempt from any payments in respect of that mineral. In fact, the international community has made the outer limit of the continental shelf itself into a partially shared area, where the coastal state acts as an agent of the international community[106] As regards the problem of Sri Lanka, the Conference decided to provide the solution in the form of a Statement of Understanding contained in an annex to the Final Act. This Statement of Understanding exempted Sri Lanka, without directly naming that country, from the application of Article 76 for the determination of the outer limit of the Continental Shelf on account that such application results in inequity. The Statement recognizes instead another method which is worked out with due regard to the special characteristics of the continental shelf of Sri Lanka.

(c) The Continental Shelf under Article 76

Article 76 contains a number of paragraphs. Paragraph 1 reads as follows:

> The continental shelf of a coastal state comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.

The "natural prolongation" argument is assumed as the cornerstone of the definition of the continental shelf, though this time its application may be considered either superfluous or, at most, relevant only to the case of a few coastal states with broad margins. The two limits are established in this article with different natures.[107] While the 200-mile distance is a geographical limit and does not necessarily have to correspond to that part of the sea-bed which is a geological natural prolongation of the land mass,[108] the outer edge of the continental margin denotes a geomorphological feature determinable in terms of geology and susceptible to the natural prolongation test. Both these limits, their apparent detailed specification notwithstanding, pose some problems however. As regards the determination of a 200-mile limit, the main problem is the method of drawing the baselines from which this distance is measured. The Convention adopts, in Articles 5 and 7, principally the same methods as were recognized in 1958 on the Territorial Sea and the Contiguous Zone, i.e., straight baselines for deeply indented coasts or where a fringe of islands exists in the vicinity of the coast and normal baselines for other cases. The methods, although not precise and satisfactory,

constituted a precedent and were not, therefore, a hard-core problem before the UNCLOS III. The result of the imprecision of the methods, which is somehow an inherent feature of them, is that coastal states, in many cases, can more or less arbitrarily determine the baselines. The application of the method of straight baselines, if it requires the utilization of straight lines of 200 miles or more, may result in a considerable change of location of the limits of national jurisdiction.[109] The problem with the second limit, i.e., the outer edge of the continental margin, is twofold. Firstly, it is prima facie the intention of the draftsmen to base this limit on both the geomorphological and geological characteristics of the sea-bed. This is clear from the definition given for the continental margin in paragraph 3 which reads:

> The continental margin comprises the submerged prolongation of the land mass of the coastal state, and consists of the sea-bed and subsoil of the shelf, the slop and the rise. It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof.

Reference to the "submerged prolongation of the land mass" is to show the relevance of geological concepts to the definition of the continental margin. While such a reference in the Truman Proclamation and to some extent in the 1958 Convention on the Continental Shelf, which were not intended to be extended to the continental rise, was warranted, the reference seems to be unjustified in the case of the continental shelf. Geologically, the structure of the sediments of the shelf and the slope are similar to that of the land territory, whereas the rise has a different structure, maybe more similar to that of the oceanic crust.[110] Therefore the extension of the concept of natural

prolongation to the rise seems to be in opposition with the geological facts.

Geomorphologically, the transition of continental to oceanic crust usually occurs in wide zones, and the boundary between the two areas is not necessarily precise and clear.[111] This brings us to the second facet of the problem: how to determine the outer edge of the continental margin? The answer which the convention provides to this question departs, in fact, from the geomorphological considerations, and rests principally upon the Irish Formula. In other words, the outer edge of the continental margin is not the seaward limit of the continental rise. Paragraph 4 contains the practical methods for establishing the outer edge of the continental margin, i.e., the legal continental shelf. It says:

> (a) For the purpose of this Convention, the coastal State shall establish the outer edge of the continental margin wherever the margin extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea was measured, by either: (i) a line delineated in accordance with paragraph 7 by reference to the outermost fixed points at each of the thicknesses of the sedimentary rocks which is at least 1 per cent of the shortest distance from such a point to the foot of the continental slope or (ii) a line delineated in accordance with paragraph 7 by reference to fixed points not more than 60 nautical miles from the foot of the continental slope.
> (b) In the absence of evidence to the contrary, the foot of the continental slope shall be determined as the point of maximum change in gradient at its base.

In both methods laid down in this paragraph, the foot of the continental slope plays a significant role. The formulation supplied in paragraph 4(b) hardly clarifies the definition of the foot of the slope. The ambiguity of the definition stems from its reliance solely on geomorphological characteristics, while a reference to the geological criterion which may ascertain the physical relationship of the foot of the slope with the land mass of

the continental shelf could further specify the location of the foot. The ambiguity in the phrase "in the absence of evidence to the contrary" and the difficulties in locating the precise position of the points of maximum change in the gradient can render the application of the foot of the slope as the basis for the determination of the outer limit somewhat problematical. Nevertheless, it should be pointed out that the foot of the slope is generally much easier to define than the edge of the rise.[112]

Another example of the terms used in paragraph 4(a), but without any definition, are the two words "sedimentary rocks". The fact is that not all geologists agree on a sole definition for any of these words.[113] The uncertainties of the expressions "foot of the slope" and "sedimentary rocks" could lead to unpredictable encroachment of the seabed. Such a situation, however, is controlled by the introduction of the limits based on depth and distance criteria in paragraph 5. Thus,

> The fixed points comprising the line of the outer limits of the continental shelf on the sea-bed, drawn in accordance with paragraph 4(a)(i) and (ii) either shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured or shall not exceed 100 nautical miles from the 2,500 metre isobath, which is a line connecting the depth of 2,500 metres.

The adoption of these distance and depth criteria is an effort to ensure the existence of a more ascertainable limit for the outer edge of the continental shelf, and evidence to the fact that was in the mind of the draftsmen was not necessarily to superimpose the legal continental shelf on the geomorphological continental margin, but only to that part of the margin which contains useful mineral resources, supposedly oil and gas, for the coastal states.[114] Oceanic ridges, like the mid-Atlantic ridges, according to paragraph

3 were not to be included in the definition of the continental margin even if they were situated in the shallow parts of the sea. The explanation resided in their geological components, which were oceanic crust. However, the inclusion in paragraph 5 of the criterion of 2,500 metre isobath, which was meant to reasonably limit the outer edge of the legal continental shelf in the areas with broad and relatively shallow margins, gave rise to the fear that such a criterion could be employed with regard to the oceanic ridges to extend the limits of the coastal jurisdiction into the middle of the oceans. In order to prevent such a thing happening, paragraph 6 of Article 76 stipulates:

> Notwithstanding the provisions of paragraph 5, on submarine ridges, the outer limit of the continental shelf shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured.

However, the exclusion of the oceanic ridges from the rule does not extend to other elevations which are considered as natural components of the continental margin. Thus, paragraph 6 of Article 76 continues: "This paragraph does not apply to submarine elevations that are natural components of the continental margin, such as its plateaux, rises, caps, banks, and spurs". The reference to "natural components" and examples cited give the impression that the distinction between oceanic ridges and other elevations on the continental margin is based on the geological differences and not the size of those elevations. But if we recall that the fear of application of the criterion of 2,500-metre depth to the oceanic ridges was due to the impact of those ridges of the process of the determination of the outer limit and not because of their geological composition, the question may arise as to the effect of those elevations which are natural components of the continental margin,

but at the same time of such considerable size that may produce a similar result in respect of establishing the outer edge of the continental margin. The Convention is silent about these cases.[115]

The preceding investigation explains that both limits established for the continental shelf, i.e. 200 nautical miles distance and the outer edge of the continental shelf margin, are difficult to determine and the methods provided for in Article 76 are based on concepts which are subject to difficult interpretations. In order to contain any effort to use these methods in such a way that the result will be inconsistent with the purpose of the Article, and also to provide for a unified interpretation of the methods for establishing the outer limit of the continental shelf, the Convention, in Article 76(8), envisages the establishment of a Commission on the limits of the continental shelf, whose main task is to "make recommendation to coastal states on matters related to the establishment of the outer limits of their continental shelf". The composition, functions and power of the said Commission are specified in Annex II of the Convention. Annex II comprises nine Articles. According to Article 2, the Commission shall consist of 21 members, all experts in the field of geology, geophysics or hydrography. The members all serve in their personal capacities. They will be elected within 18 months of the date of the entry into force of the Convention in a meeting of the states parties which is to be convened by the Secretary-General of the United Nations. Article 3 specifies two functions for the Commission: 1- to consider the information submitted by the coastal states concerning the outer limit of the continental shelf in areas beyond 200 nautical miles by a majority two-thirds of members

present and voting and to make recommendations in accordance with Article 76 and the statement of understanding, and 2- to provide scientific and technical advice, if requested by the coastal state.

Both the contents of Articles 4, 5, 6 and the combined reading of Articles 6(3), 7, 8 suggest that the recommendations of the Commission are not binding, and do not create any obligation for the coastal state.[116] While according to Article 8, the coastal state is obligated to act in conformity with the dictates of Article 76(8) of the Convention, i.e. to submit information on the limit of the continental shelf beyond 200 miles, to the Commission, there is no obligation for the coastal state to accept the Commission's recommendations.

The purely recommendatory character of the suggestions of the Commission is due to the fact that the determination of the outer edge of the continental shelf as a zone under national jurisdiction was considered, by many delegations, as an exercise of the exclusive sovereign rights of the coastal states,[117] and the demand of some delegations to give the Commission the power to make binding decisions on behalf of the international community was rejected. Although the argument in support of exclusive competence of the coastal state in establishing the outer limit of its continental shelf was probably justifiable before the era of the United Nations claim on the sea-bed, the creation of the Authority as a subject of international law, and with a domain of activities which have common frontiers with the sea-bed under coastal states' jurisdiction, logically requires some sort of sharing of competence in drawing the borderline by such states on the one side and the Authority on the other. Such is not the case, however, and the international

community or its trustee, the Authority, not only plays hardly any role in the process of the determination of the outer limit, but it even lacks the right to remind coastal states which delay defining the outer limits of their legal continental shelves of their obligations under the Convention.[118] The last sentence in Article 76(8) stipulates that: "the limits of the shelf established by a coastal state on the basis of these recommendations shall be final and binding". It may be inferred from this provision that continental shelf limits determined as a lawful unilateral act of a coastal state but not on the basis of the Commission's recommendations may not gain international recognition, nor be considered final. Hence, the Commission's lack of competence to issue binding instructions is not equal to its being merely a formal body. On the contrary, "the fact that a delimitation will not be disputable if it agrees with the suggestions of the Commission . . ."[119] and the role that the Commission can play in the uniform and objective application of Article 76, surely contribute to its significance.[120]

The question which remains unanswered is who will have the last word in regard to the establishment of the outer limit of the continental shelf, and what will happen if the coastal state and the Commission, despite all efforts, cannot agree on the determination of the limits? It is not clear either if the denial of the coastal state to establish its continental shelf's limits because of disagreement with the Commission's recommendations may give rise to any dispute judiciable before a third-party dispute settlement body under Part XV of the Convention.[121] The definition of the continental shelf in Article 76 and the methods for the

determination of its outer limit are undoubtedly more complex than in the 1958 Convention on the continental shelf. The maximum limits are now more clearly defined, although the concepts applied in the definition may be subject to different interpretations. Article 76 can probably accommodate the claims of almost all coastal states,[122] because the draftsmen have successfully managed to incorporate sufficiently flexible criteria in that Article so that all interests can be taken into consideration.[123] However, since one of the main problems before the Conference was the establishment of the precise limits of national jurisdiction, the real success of the draftsmen in this respect is questionable and remains to be seen in practice.

SECTION IV: EVALUATION

A present characteristic of the limits of the coastal jurisdiction has been their imprecision. This is partly due to the difficulties of establishing a precise boundary in the sea and partly due to the reluctance of the coastal states to confine themselves to a clearly specified limit. This somewhat historical pattern tended to change when in 1967 the sea-bed and subsoil thereof beyond the limits of national jurisdiction and their resources were declared as the common heritage of mankind. The question of establishing the limits of coastal jurisdiction, which by then had only one dimension and was acknowledged as a unilateral

act of the coastal state to be exercised at its own discretion, found a new international dimension.

The introduction of mankind as holder of rights over the resources of the sea-bed beyond the area of national jurisdiction resulted in two movements. The first was the intensification of the already existing competition for the extension of the coastal maritime zone, and the second was the effort to establish a precise boundary between the national and international area. What came out of the first movement was agreement on a maximum 12-mile territorial sea and a 200-mile EEZ. The adoption of the latter took more than 35 per cent of the ocean, containing over 90 per cent of the living resources of the sea, under the jurisdiction of the coastal states. It may be noted that the exactness of the limits established for territorial sea, the contiguous zone and the EEZ is subject to the flexibility of the rules for establishing the baselines from which these zones are measured.

As regards the establishment of the boundaries between national and international sea-bed areas, which constituted the second movement, the result of the efforts embodied in Article 76 can hardly be described as successful and, despite their impressive detailed appearance, may not produce a precise boundary. While in the case of the territorial sea or the EEZ, the imprecision and lack of uniformity may depend solely on the rules for establishing the baselines, in the case of the continental shelf the determination of both the baselines and the outer limit is subject to extensive interpretations of the rules.[124] A great disadvantage of Article 76 is that it does not envisage the slightest role for the Authority as the trustee of mankind in the international sea-bed area to

participate in the determination of its common boundaries with coastal states, since the establishment of the borderlines between the two areas is under the competence of the coastal states.[125]

While no mechanism has been provided to defend the integrity of the Area and the interests of mankind in the event of possible excesses by a coastal state in the determination of the outer limit of its continental shelf, the Convention does contain provisions aimed at the protection of the interests of coastal states where activities are conducted in the Area with respect to resource deposits which lie across the limits separating the Area from the continental shelf. In this case, activities in the Area shall be conducted with regard to the rights and interests of that state. A set of procedures has been formulated to protect the rights and interests of the state concerned including prior consultation with such a state and notification, and, in some cases, the requirement of its consent (Article 142 of the Convention). In these situations, it can be anticipated that the application of Article 142 of the Convention[126] will be difficult and it is even "possible that the Authority could be restrained from exploiting deposits less than five to six hundred miles from the coast because of uncertainty about jurisdictional limits".[127] Finally, it should be noted that the borderline drawn between the continental shelf and the Area is in the majority of cases the line of distinction between the area of organic and the area of non-organic resources, principally the polymetallic nodules.

This situation was quite unthinkable in 1967 when the idea of an international sea-bed area under international management was born. We share Ogley's view where he says:

> UNCLOS thus continued, for the sea-bed as well as the seas themselves, the process of "enclosure" that had begun with the Truman Proclamation of 1945. The possibility that what was left unenclosed might become the "common heritage of mankind" has not arrested this trend. The Convention made it clear that what would be left to the International Authority would be a severely attenuated version of what Pardo could have envisaged in 1967, if the limits of national jurisdiction has been frozen. 128

In retrospect may be the adoption of one unified criterion of a 200-miles distance for both the EEZ and the continental shelf as the best solution, because it was, firstly, more precise and easier to establish than the complicated formulae which are now incorporated in Article 76(4) and (6) and, secondly, the area of the common heritage of mankind could be at least 14 million square kilometres more than what it supposedly is today. In short, the international Sea-bed Area is the portion of the sea-bed which comes directly after the outer limit of the continental margin. This margin does not exceed 350 nautical miles from the baselines of territorial sea or 100 nautical miles from the 2500 metre isobath which is a line connecting the depth of 2500 metres.[129]

Footnotes - Chapter Two

1. The terms "area", "deep sea-bed", "ocean floor" and "abyssal plain" have been interchangeably used in recent years to refer to the part of the bed of the oceans which lies beyond the limits of coastal state jurisdiction. See Section II of this chapter.

2. See UN Doc. A/7230, p.11, para. 49. In this respect, the views expressed by Belgium (A/AC.135/SR.1-9, p.35), the United States (A/AC.135/25), and Ceylon (A/C.1/PV.1588, para. 146) in the Ad Hoc Committee or the General Assembly can be mentioned as examples.

3. UN Doc. A/C.1/PV.1675, para. 74 (Malta).

4. R. Galindo Pohl, "Latin America's Influence and Role in the Third United Nations Conference on the Law of the Sea", 7 ODIL (1979), pp.65-87, at p.75. The argument of Chile, e.g., was that since the regimes of outer space, territorial sea, contiguous zone and continental shelf were established before their limits were decided, the same could apply to the deep sea-bed. See UN Doc. A/AC.138/SR.22, p.50 (Chile)).

5. L.S. Ratiner and R.L. Wright, "United States Ocean Mineral Resource Interests and the United Nations Conference on the Law of the Sea", 6 NRL (1973), pp.1-43, at p.12. In the working papers presented by the United States (A/AC.138/25), the United Kingdom (A/AC.138/26) and France (A/Ac.138/27) to the Sea-Bed Committee concerning the establishment of an international regime for the deep sea-bed, almost no mention had been made of the limits of national jurisdiction.

6. Off. Rec., Vol. VII, p.4.

7. The exclusive economic zone, a major outcome of the UNCLOS III, as defined in the Convention (Articles 55-75) is an area beyond and adjacent to the territorial sea extending up to 200 nautical miles from the baselines within which the coastal state would have sovereign rights for the exploration and exploitation of natural resources and for other functional activities in the zone, such as production of energy from water, currents and winds. But coastal states' rights would be balanced by the maintenance within the zone of the freedom of navigation and overflights as well as freedom to lay submarine cables and pipelines. See, e.g., R.P. Anand, Law of the Sea, Caracas and Beyond, p.379. The Hague: Nijhoff, 1980.

8. Continental shelf is an old term. In the search for revenues from high technology ocean floor mining, the UNCLOS III redefined continental shelf to include the entire continental margin (continental shelf, slope and rise). See K.O. Emery, "Geological limits of the continental shelf", 1/2 ODIL, NY, (Nov. 10, 1981), pp.1-10.

9. The territorial sea is a belt of water of specified width between the land territory and internal waters of a state on one side and the high seas on the other. See Oliver Lissitzyn, International Law: Today and Tomorrow, p.19. New York: Oceana Publications, 1965. One of the problems that was clearly remedied in the new Convention is the breadth of the territorial sea. Every state had the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from the baselines. See John King Gamble Jr. and Maria Frankowska, "The significance of signature to the 1982 Montego Bay Convention on the Law of the Sea", 14/2 ODIL (1984), p.134.

10. This point will be elaborated more later in this chapter. See, for example, Section II (d).

11. Some geologists divide the sea-bed into four areas, adding to the ocean floor the mid ocean ridges and their accompanying systems of deep rift trenches as two separate entities. See, e.g., H.H. Collins, Jr., "Mineral Exploitation of the Sea-bed: Problems, Progress and Alternatives", 7 NRL (1979), pp.599-692, at 601.

12. K.O. Emery and B.J. Skinner, Mineral Deposits of the Deep Ocean Floor, p.5. New York: Crane, Russak & Company, 1977.

13. These states include Kuwait, Saudi Arabia, Qatar, United Arab Emirates and Oman.

14. YBILC, 1950, Vol. II, p.49.

15. Ibid.; J. Andrassy, International Law and the Resources of the Sea, p.49. New York: Columbia University Press, 1970.

16. C.H.M. Waldock, "The legal basis of claims to the continental shelf", 36 Grot. Trans. (1950), pp.115-148. The claim stated that "Henrietta, Jeannete, Benett, Herald and Vyedineniya Islands which, together with new new Siberia, form a northward extension of the continental platform of Siberia". W.M. Mouton, The Continental Shelf, pp.240-241, at p.240, 1952.

17. R.P. Anand, Legal Regime of the Sea-Bed and the Developing Countries, p.32. Leyden: Sijthoff, 1976.

18. J.A.C. Gutteridge, "The 1958 Geneva Convention on the Continental Shelf", 35 BYIL (1959), 102-123, at pp.102-103.

19.. M.S. McDougal and W.T. Burke, The Public Order of the Oceans, p.636. New Haven: Yale University Press, 1962.

20. Both proclamations are quoted in M.M. Whiteman, Digest of International Law, Vol. 4, pp.756-757. Washington D.C.: State Department of Publication, 1965.

21. In 1953, however, the Outer Continental Shelf Lands Act, Article 1332, para. (a), provided that the subsoil and sea-bed of the outer continental shelf appertains to the United States and are subject to its jurisdiction, control and power of disposition. See United Nations Legislative Series No. ST/LEG/SER.B/15., p.462, 1970.

22. A. Pardo, "Whose Is the Bed of the Sea?", 62 Proc. ASIL (1968), pp.216-229, at p.218.

23. For discussion on the interpretation of the term sovereignty and the reason why this term was not employed in the Truman Proclamation, see the statement of the representative of Brazil to the second session of the Conference, in Off. Rec., Vol. I, p.61, para. 27.

24. H. Lauterpacht, "Sovereignty over submarine areas", 17 BYIL (1950), pp.376-433, at p.389.

25. White House press release issued on 28 September 1945, quoted in Whiteman, op. cit., pp.757-758.

26. These declarations are as follows: Mexico (1945); Argentina, Panama (1946); Chile, Guatemala, Peru, Dominican Republic (1947); Costa Rica, The United Kingdom [on behalf of Bahamas and Jamaica] (1948); Saudi Arabia, Philippines, The United Kingdom [on behalf of Arabian Gulf Sheikdoms, viz. Bahrain, Qatar, Abu Dhabi, Kuwait, Dubai, Sharja, Ummal Qewain, Ajman] (1949); Honduras, Nicaragua, Brazil, El Salvador, Pakistan, Ecuador, The United Kingdom [Falklands] (1950); Israel, Korea (1952); Australia, Venezuela (1953); The United Kingdom [North Borneo] (1954); India, Iran (1955); Portugal (1956). See Lauterpacht, op. cit., pp.380-381.

27. Andrassy, op. cit., p.50.

28. McDougal and Burke, op. cit., p.637.

29. R.P. Anand (ed.), The Law of the Sea: Caracas and Beyond, p.149. The Hague: Nijhoff, 1980.

30. Some examples are: 1- Presidential Declaration of Chile, dated 23 June 1947, Article 2 of which reads: "The Government of Chile confirms and proclaims its national sovereignty over the sea adjacent to its coasts whatever may be their depths ..."; 2- Presidential Decree No. 781 of Peru, dated 1 August 1947, which says: "National sovereignty and jurisdiction are to be extended over the sea adjoining the shores of national territory whatever its depth and in the extension necessary to reserve, protect, maintain and utilize natural resources and wealth of any kind which may be found in or below those waters". For a detailed account of these declarations, see Whiteman, op. cit., pp.793-801. For discussion about the nature of these claims, see D.H.N. Johnson, "The Legal Status of the Sea-Bed and Subsoil", 16 ZaoRV (1957), pp.474-87.

31. In fact, whilst no state made objection to the Truman Proclamation or subsequent declarations similar to it, the Latin American declarations by states such as Chile and Peru were subject to immediate diplomatic protest from the United States and the United Kingdom.

32. For discussion about the enforcement of jurisdiction by Chile and Peru in their claimed 200-mile maritime zones, see K. Hjertonsson, The Law of the Sea, pp.26-28. Leiden: Sijthoff, 1973.

33. Lauterpacht, op. cit., p.376.

34. A full account of this arbitration is given in 46 AJIL (1952), pp.512-514.

35. Award of Lord Asquith of Bishopstone in The Matter of an Arbitration between Petroleum Development (Tricial Coast) Ltd. and The Sheik of Abu Dhabi in 1 ICLQ, p.256, 1952.

36. The International Law Association, in its 1948 report, pointed out: "It is remarkable that in the two and a half years which have elapsed since the issue of this Proclamation, almost no publication on international law outside the U.S. has paid any attention to this Proclamation". See 1948 ILA Report, p.195.

37. See W.E. Butler, "The Soviet Union and the Continental Shelf", 63 AJIL (1969), pp.103-107, at p.103.

38. YBILC, 1950, Vol. II, p.384.

39. Ibid.

40. YBILC, 1953, Vol. II, p.141..

41. Ibid., Vol. I, p.73.

42. Ibid., Vol. II, p.213.

43. The text of Article 2 in 1953 Draft Articles on the Continental Shelf reads as follow: "The coastal states exercises over the continental shelf sovereign rights for the purpose of exploring and exploiting its natural resources". See ibid., p.212.

44. F.V. Garcia Amador, The Exploitation and Conservation of the Resources of the Sea, p.108. Leyden: Sijthoff, 1959.

45. YBILC, 1956, Vol. II, p.264.

46. L. Henkin, "A Reply to Mr Finlay", 64 AJIL (1970), pp.62-72, at p.67.

47. UN Doc. A/3572.

48. The text of the 1958 Convention on the Continental Shelf is published in UNTS, Vol. 499, p.312.

49. See Garcia Amador, op. cit., p.121.

50. Butler, op. cit. It was generally the opinion of the Soviet jurists who supported the exploitability criterion, but at the same time feared its undesired consequences in respect of maritime expansionism. See UN Doc. A/AC.138/SR.58, p.186.

51. S. Oda, "Proposals for Revising the Convention on the Continental Shelf", 7 Col.JTL (Spring 1968), p.9. Anand, op. cit., p.51. See also R. Young, "The Limits of Continental Shelf and Beyond", 62 Proc. ASIL (1968), pp.229-36, at p.230.

52. Andrassy, op. cit., p.88.

53. Garcia Amador, in an effort to give precision to the term "adjacent", explained to the ILC that: "the adjacent areas ended at the point where the slope down to the ocean bed began, which was not more than 25 miles from the coast". See L. Henkin, "International Law and 'the Interests': the Law of the Sea", 63 AJIL (1969), pp.504-10, at pp.506-07.

54. A.L. Hollick, U.S. Foreign Policy and the Law of the Sea, p.151. New Jersey: Princeton University Press, 1981.

55. Andrassy, op. cit., p.123.

56. I. Brownlie, Principles of Public International Law, 3rd edition, p. 225. Oxford: Clarendon Press, 1979.

57. The result of the work of the 1958 Conference was four Conventions: 1- Convention on the Territorial Sea and the Contiguous Zone, adopted on 29 April 1958 (UNTS, Vol. 516, p.206); 2- Convention on the High Seas, adopted on 29 April 1958 (UNTS, Vol. 450, p.82); 3- Convention on Fishing and Conservation of the Living Resources of the High Seas, adopted on 28 April 1958 (UNTS, Vol. 59, p.286); 4- Convention on the Continental Shelf, adopted on 29 April 1958 (UNTS, Vol. 499, p.312).

58. W.C. Lynch, "The Law of the Sea and the Developing Countries: Cornucopia or Catastrophe" in Walsh (ed.), The Law of the Sea, Issues on Ocean Resources Management, pp.117-28, at p.118. New York: Preager, 1977.

59. Butler, op.cit., p.103.

60. Only half of the participating delegates in the 1958 Conference were from the developing countries. Africa had only seven delegations.

61. Eckert, R.D., The Enclosure of Ocean Resources, p.38. Standford: Hoover Institution Press, 1979.

62. North Sea Continental Shelf Cases Judgement, ICJ Reports, p.3, 1969.

63. Ibid., p.6.

64. Ibid., para. 15.

65. Article 6 of the 1958 Convention on the Continental Shelf states:
"1- Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equi- distance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.
2- Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.
3- In delimitating the boundaries of the continental shelf, any lines which are drawn in accordance with the principles set out in the paragraphs 1 and 2 of this article should be defined with reference to the charts and geographical features as they exist at a particular date, and reference should be made to fixed permanent identifiable points on the land."

66. ICJ Reports, p.6, para. 13, 1969; Andrassy, op. cit., p.98.

67. ICJ Reports, p.6, para. 19, 1969.

68. Ibid., para. 96.

69. Ibid., para. 39.

70. Ibid., para. 41.

71. Ibid., para. 43.

72. The concept of natural prolongation has been reflected in the subsequent case of the ICJ. It has been discussed extensively in an international arbitration between France and the UK in 1975. See, Channel and Western Approaches Arbitration (France v. UK), 54 ILR 6, at p.99.

73. UN Doc. A/6695.

74. See S. Oda, The Law of the Sea in Our Time - II, The United Nations Sea-bed Committee, 1968-1973, p.18. Leyden: Sijthoff, 1977.

75. See, e.g., the statements of the representatives Peru and Chile in the Ad Hoc Committee; UN Doc. A/AC.135/SR, pp.37, 44 and 79 respectively.

76. UN Doc. A/7230, p.48.

77. UN Doc. A/7622, p.26.

78. Ibid., p.22.

79. UN Doc. A/C.1/L.473.

80. See Nordquist, op. cit., p.169.

81. S. Oda, The International Law of the Ocean Development, p.343. Leiden: Sijthoff, 1972.

82. See Nordquist, op. cit., pp.178-182.

83. UN Doc. A/AC.138/81.

84. UN Doc. A/9021, Vol. IV, pp.66-67. For a detailed account of all suggestions concerning the outer limit of the continental shelf in 1973, see UN Doc. A/AC.138/94/Add.1, pp.2-3.

85. See, e.g., UN Doc. A/C.1/PV.1800, para. 141 (Canada), A/C.1/PV.1843, para. 31 (Ceylon).

86. UN Doc. A/8721, pp.180-82.

87. Ibid. Articles II, IV and VII.

88. By the end of 1986 seventy-eight states had enacted laws or issued declarations concerning the limits of their EEZ. For a list of these countries see, Law of the Sea, National Legislation on the Exclusive Economic Zone and the Exclusive Fishery Zone, published by the Office of the Special Representative of the Secretary-General for the Law of the Sea, New York, 1986.

89. It bears recalling that the United States, in a "Draft United Nations Convention on the International Sea-Bed Area" submitted to the Sea-Bed Committee in 1970, considered the sea-bed and subsoil seaward of the 200-metre isobath as the common heritage of mankind. Although the resources of the area between the 200-metre isobath and the foot of the continental slope was, according to this draft convention, to be exploited by the coastal state as a trustee for the international community, the idea of extending the sovereignty

of the coastal state to 200 nautical miles could not yet be taken seriously. See UN Doc. A/AC.138/25, Articles 1, 3 and 26.

90. See, e.g., the statement of the representative of Kenya at the Second Committee of the UNCLOS II in 1974, Off. Rec., p.161.

91. Among the developing countries, Argentina, Bangladesh, Brazil, Colombia, India, Madagascar, Mexico, Uruguay and Venezuela supported the extension of the coastal sea-bed jurisdiction to the edge of the continental margin. See M. Bennouna, "La limite extericure du plateau continental et la gestion des resources pour l'humanite", in 1981 Workshop of the Hague Academy of International Law, pp.109-24, at p.111.

92. UN Doc. A/CONF.62/WP.81, Part II, Article 62.

93. R.C. Ogley, op. cit., p.117.

94. M. Koga, "Boundary of Continental Shelf Deep Sea-Bed from the Aspects of their Regimes, The Frontiers of the Seas", Proceedings of the 5th International Ocean Symposium, Tokyo, 1980, pp.21-26, at p.24. Ocean Association of Japan, 1981.

95. The relevant part of the Irish informal text reads:
"2- The continental margin comprises the submerged prolongation of the land mass of the coastal State, and consists of the sea-bed and subsoil of the shelf, and slop and the rise. It does not include the deep ocean floor nor the subsoil thereof.
3- For the purpose of this Convention, the coastal State shall establish the outer edge of the continental margin wherever the margin extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured by either:
(a) A line delineated in accordance with paragraph 4 by reference to the outermost fixed points at each of which the thickness of the sedimentary rocks is at least 1 per cent of the shortest distance from such point to the foot of the continental slope or,
(b) A line delineated in accordance with paragraph 4 by reference to fixed points not more than 60 nautical miles from the foot of the continental slope.
4- The coastal State shall delineate the seaward boundary of the continental shelf where the shelf extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured by straight lines not exceeding 60 nautical miles in length, connecting fixed points to be defined by coordinates of latitude and longtitude." Off. Rec., Vol. XI, p.124.

96. Ibid., Vol. V, p.153.

97. At the 50th meeting of the Second Committee on 23 June 1977, the representative of Colombia proposed that the Secretariat

should prepare a preliminary study, including maps, about the implications of the various approaches to the question of the outer limit of the continental shelf. These approaches were a 200-mile distance from the coast, 500-metre isobath and the formula contained in the Irish proposal. This proposal was welcomed by many States, but some delegations considered it unrealistic and extremely costly and difficult to carry out. The representative of Austria modified the Colombian proposal by suggesting that the study should be limited to some selected areas and by adding that the outer limit of the continental margin, as was proposed by Article 4 of the RSNT, should also be studied. The decision of the Chairman of the Second Committee not to include the Irish Formula in the ICNT was due to the uncertainty which still prevailed in respect of the criteria for the determination of the outer limit of the continental shelf.

98. Off. Rec., Vol. XI, p.124.

99. Caflisch, "Les zones maritimes sous jurisdiction nationale, leurs limites et leur delimitation", 84 RGDIP (1980), pp.68-119, at p.69.

100. Sri Lanka and the Soviet Union suggested some amendments to the Irish formula. See UN Doc. A/CONF.62/C.2/L.100.

101. B.H. Oxman, "The Third United Nations Conference on the Law of the Sea: the Eighth Session (1979)", 74 AJIL (1980), pp.1-47, at p.20.

102. UN Doc. A/CONF.62/L.37.

103. B.H. Oxman, "The Third United Nations Conference on the Law of the Sea: the Ninth Session (1980)", 75 AJIL (1981), pp.211-56, at p.228.

104. A modification to that effect was incorporated to paragraph6 of Article 76 of the ICNT/Rev.2.

105. For the objections to the definition, see, e.g., UN Doc. A/CONF.62/WS.110 (Austria).

106. Philip Allott, "Power Sharing in the Law of the Sea", 77 AJIL (1983), Vol. 77, pp.1-27, at p.18.

107. See Ogley, op. cit., p.117.

108. For instance, in the case of most of those Latin American states bordering the Pacific Ocean, the continental shelf includes not only the shelf, slope and rise, but also oceanic tenches.

109. Ogley believes that the application of straight lines of 200 miles or more can transfer about 2,500 square miles from the

international area to the area under a coastal state's jurisdiction. See Ogley, op. cit., p.124.

110. See G.R. Feulner, "Delimitation of Continental Shelf Jurisdiction Between States: the Effects of Physical Irregularities in the Natural Continental Shelf", 17 Vir.JIL (1976), pp.77-105, at p.85.

111. See D.J. McMillan, "The extent of the Continental Shelf: Factors affecting the accuracy of a continental margin boundary", 9 Marine Policy (1985), pp.148-56, at p.148.

112. McMillan, ibid., p.149.

113. McMillan, e.g., observes:
"The boundary between metamorphic rocks and diagenitically altered sedimentary rocks is often hard to determine. Additionally, some rocks, e.g. volcan calistic rocks, can be classified as either sedimentary or igneous depending on the purpose of the classification. The term 'rock' is often defined geologically as including unconsolidated mineral matter; however, in common language and amongst other professions the term usually only refers to consolidated material. The term 'sedimentary rock' is considered by some geologists to include unconsolidated as well as consolidated sediments but others apply the term only to consolidated sediments." See ibid., p.150.

114. E.D. Brown, "Delimitation of Offshore Areas, Hard Labour and Bitter Fruits at UNCLOS III", 5 Marine Policy (1981), pp.172-84, at pp.175-76.

115. K.O. Emery, "Geological Limits of the 'Continental Shelf'" in The Frontiers of the Seas, op. cit., p.28.

116. C.L. Rozakis, "Compromises of States' Interests and their Repercussions upon the Rules on the Delimitation of the Continental Shelf: From Truman Proclamation to the 1982 Convention on the Law of the Sea", in Rozakis, op. cit., pp.155-183, at p.173.

117. The ICJ in the Anglo-Norwegian Fisheries case stated that the delimitation of the maritime zones is a unilateral act under the exclusive competence of the coastal state. Nevertheless, it emphasized that such an act had always an international aspect. According to the court: the delimitations of sea areas always has an international aspect; it cannot be dependent merely upon the will of the coastal state as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal state is competent to undertake it, the validity of delimitation with regard to other states depends upon international law. ICJ Reports 1951, p.116, at 132.

118. A. Pardo, "Before and After", 46 LCP (1983), pp.95-105, at p.103.

119. Rozakis, op. cit., p.173.

120. E.D. Brown, "The United Nations Convention on the Law of the Sea: the British Government's Dilemma", 37 CLP (1984), pp.259-93, at p.263.

121. Adede, A.O., "Streamlining the System for Settlement of Disputes Under the Law of the Sea Convention", 1 PLR (1980), pp.15-58, at p.39.

122. The claim of the majority of the states was confined to 200 nautical miles which was accommodated in the early stages of the Conference. The real problem concerned states with broad continental margins. The formulae contained in Article 76(4) to (6) were to meet the requirements of these states. There were both developing and industrialized countries included in this group. According to an estimate, the application of Article 76 in the case of Oman, France, New Zealand, the Soviet Union, Spain, Madagascar, Sri Lanka, Portugal, Namibia, the United Kingdom, India, Australia, the United States, Canada and Brazil may annex to these states the areas of the sea-bed ranging between 300,000 (Oman) up to over two million square kilometres (Brazil) beyond their respective 200-mile areas. See Vitzthum and Platzoder, "The United Nations Convention on the Law of the Sea: The Pros and Cons", 28 Law and State (1983) pp.32-41, at p.35.

123. Pardo, op. cit., p.99.

124. An example is the efforts of Chile and Ecuador to establish the outer limits of their respective continental shelves through the application of some of the technical criteria of Article 76 for the cases where the outer limit of the continental shelf extends beyond the 200-mile limit. The interpretation of Chile and Ecuador in this respect has been protested by the United States. See Ocean Policy News, p.2. Washington, DC: Council of Ocean Law.

125. Pardo observes this point, and comments: ". . . The future Authority (a) must passively await notification by coastal states of the limits of their continental shelves; (b) may not question in any way the limits notified to it; (c) may not remind any coastal state of its obligation to establish firm limits to its continental shelf; and (d) may not establish provisional boundaries for the International Sea-Bed Area in the event that coastal states' notifications are delayed". See Pardo, "The Convention on the Law of the Sea: A Preliminary Appraisal", 20 SDLR (1983), pp.489-503, at p.499.

126. The first two paras. of Article 142 read:
"1- Activities in the Area, with respect to resource deposits in the Area which lie across limits of national jurisdiction,

shall be conducted with due regard to the rights and legitimate interests of any coastal state across whose jurisdiction such deposits lie.
2- Consultations, including a system of prior notifications, shall be maintained with the state concerned, with a view to avoiding infringement of such rights and interests. In cases where activities in the Area may result in the exploitation of resources lying within national jurisdiction, the prior consent of the coastal state concerned shall be required."

127. Pardo, op. cit., p.103.

128. Ogley, op. cit., p.127.

129. Article 121 of the Convention restricts continental shelf claims on the subject of islands. According to this Article, rocks that cannot sustain human habitation or economic life of their own, and have no exclusive economic zone or continental shelf, in which case the separation line shall be the outer limit of the territorial sea of such rocks (Article 121, para. 3).

CHAPTER THREE

THE LEGAL STATUS OF THE SEA-BED UNDER CLASSIC DOCTRINES

SECTION I: THE LEGAL STATUS OF THE SEA-BED AND ITS RESOURCES

The question of the legal status of the sea-bed and its resources has been the subject of many discussions since the turn of this century. The introduction of the continental shelf doctrine in 1945 intensified the debates on the sea-bed beyond the territorial sea. The United Nations General Assembly, in 1967, officially opened the debate on the legal status of the deep sea-bed area and its resources. In fact, sea-bed debates have been going on since 1967 until today.

In the case of the continental shelf, firstly, the establishment of the sea-bed legal status was important in view of the exclusive rights of the coastal states against flag states. In the case of the deep sea-bed area, secondly, the question is not the right of coastal states, but the right of the whole international community to the resources of the deep sea-bed area.

In The North Sea Continental Shelf cases, the Roman Law doctrines of res nullius or res communis were examined against a legal right of the coastal states over the continental shelf based on "natural prolongation" and "adjacency" arguments. Finally, in the issue of the deep sea-bed area, we see the re-rising of res nullius, res communis doctrines and the principle of the freedom of the high seas versus the new concept of the common heritage of mankind.

Res nullius refers, in Roman law, to the things which do not belong to anyone, but are susceptible to being owned,[1] such as wild

animals, birds and fish. What is meant by res communis[2] in civil law is things common to all; that is, those things which are used and enjoyed by everyone, even in single parts, but can never be exclusively acquired as a whole, e.g., light, air, running water. In fact, these classic doctrines dealt with the rights and duties of individuals in respect of other individuals within the Roman Empire and, therefore, had a private nature. Their sole purpose was to define different sorts of ownership among individuals within the same national community.[3] As regards the sea, the classic doctrines were designed only to regulate the relations among the subjects of the Roman Empire, indeed, no "free use of the sea for peoples outside the Empire . . ."[4]

The modern application of the classic doctrines has been used with respect to relations among states. Generally speaking, the technologically advanced countries have chosen to base their claims on using the sea on res nullius or res communis doctrines as representing existing international law. It is arguable whether these classical terms can be used at all to justify new situations which were unthinkable at the time of their formation.

It is worthwhile to examine in this chapter the origin of these two Roman Law doctrines and to see how they have been employed to justify the claims of rights to the sea-bed and subsoil and the resources thereof. This examination covers also the developments of the principle of the freedom of the high seas, and the nature of the arguments based on the ancient doctrines in comparison to the concept of the common heritage of mankind and the arguments derived from that. The following chapter is devoted to the concept of the common heritage as a new element of international law.

SECTION II: CLAIMS OF RIGHTS BASED ON RES NULLIUS DOCTRINE

With respect to the resources of the sea-bed, the reference to the res nullius doctrine was primarily in connection with the sedentary fisheries on the sea-bed outside the limits of the territorial sea.[5] Vattel, the famous jurist of the 18th century is often quoted as being one of the first writers who treated the question of the legal status of sedentary fisheries.[6] He regarded the sedentary fish as capable of being owned, because nature has placed them within the reach of the coastal state and that state may capture them in the same way as they have captured the land they inhabit.[7] His main argument was that, unlike free-swimming fish, sedentary fish are exhaustible, and therefore it is inevitable that the coastal state should have exclusive right to them.

To base these claims of rights on a legal doctrine, later writers during the early decades of this century developed Vattel's views and extended the res nullius doctrine to the sea-bed outside the territorial sea but close to the coast. Sir C.J.B. Hurst, for example, treated the sea-bed not as part of the sea but as a territory covered by the high seas and, therefore, res nullius.[8] Occupation is one of the means by which such rights may be acquired under this doctrine.[9] The practice of states in respect to the sedentary fisheries was often justified by claiming the existence of the status of effective occupation. Under the arguments of the advocates of the res nullius doctrine, one can point to two common elements. They believe that the occupation should be effective and it should be enforced by states or through frequent activities of

their nationals. With regard to the second element, res nullius is different from its original Roman law form which was to regulate the relations between individuals rather than states. Moreover, there is no clear indication in the writings of these advocates as to what constituted effective occupation of the sea-bed and its resources. What later writers have suggested is equal to physical presence in order to guarantee the exclusion of foreigners, and carrying out activities which are regulated by domestic legislation.[10] This definition is not exhaustive, and it seems that there are still some misinterpretations about the meaning of effective occupation in the sea.[11] However, it is clear that the emphasis on effective occupation as a conditio sine qua non for the acquisition of title to the sea-bed and its resources such as sedentary fisheries, was inspired not only by the practice of states regarding the acquisition of right over terra nullius, but also by recognition in international law of occupation as a form of acquisition which was legalized by the 1885 Act of Berlin.[12] The notion of effectiveness as regards the occupation of unclaimed territories suffered a radical change after two international arbitrations in 1928 and 1931, and a judgement of PCIJ in 1933. These cases have some connections with the discussion relating to the legal status of the sea-bed and its resources after the introduction of the Truman Proclamation.

The first of these was the Island of Palmas case of 1928 between the Netherlands and the United States.[13] The United States had claimed that, according to Article III of the treaty of peace between the United States and Spain from 1898, this island, which is located between the Philippines and Borneo and was considered to be

included in the Philippines archipelago, was ceded to the United States. The Netherlands, on the other hand, had based its claim of sovereignty on the agreements signed with the native princes, as well as the peaceful continuous display of state authority over the island.[14] The claims of the United States were based on the titles of discovery, contiguity and recognition by treaty. The sole arbitrator, Max Huber, the President of PCIJ at that time, considered the American claim to the title of discovery as inchoate title, which could not prevail over a definite title founded on a continuous and peaceful display of sovereignty.[15] The title of contiguity, in the arbitrator's opinion, had no foundation in international law.[16]

The Dutch had not directly displayed their sovereignty over the island very often. In fact, during the 18th and 19th centuries there were considerable gaps in the evidence of continuous display.[17] The arbitrator, bearing in mind that manifestation of sovereignty over a distant island could not be expected to be frequent, ruled that the exercise of some acts of state authority such as visits of Dutch ships to the island between 1895 and 1906, and the existence of things such as flags or coats of arms, as external signs of sovereignty could:

> . . . constitute a beginning of establishment of sovereignty by continuous and peaceful display of a state authority, or a commencement of occupation of an island not yet forming a part of the territory of a state, and such a state of things would create in favour of the Netherlands an inchoate title for completing the conditions of sovereignty. 18

The classical elements of effective occupation of an unoccupied territory, i.e. settlement, administration and uninterrupted use

were thus challenged as a result of the isolation of the island in question.

The second case was that of the Clipperton Island between France and Mexico. The Clipperton Island is in the Pacific Ocean and lies off the Mexican coast. The sovereignty over this island was the subject of dispute between France and Mexico. The two states referred the dispute by an agreement of 1909 to the King of Italy, Victor Emmanuel III, as an arbitrator, who rendered his decision in 1931.[19] The French claim of sovereignty over the island was based on the fact that, in 1858, a French commercial vessel had been in the vicinity of the island, but due to very difficult weather conditions and despite several efforts, it had had to adjourn without leaving any sign of sovereignty on the island. Before leaving the region, the captain, on board the vessel, had drawn up a proclamation of French sovereignty over the island, and some geographical notes had also been taken. The French consulate in Honolulu, a few weeks after this unsuccessful effort, had notified the Government of Hawaii of the assumption of sovereignty over Clipperton Island by the French Government. There was no dispute over this uninhabited island until 1898, when Mexico, according to a French inquiry addressed the Government of the United States concerning the activities of some American citizens on the island, claiming that the island, belonging to the Spanish Government in North America, came under Mexican sovereignty in 1836 as a result of succession.

The arbitrator, refusing the allegation of discovery by Spain, maintained that, even if the island had been discovered by Spain, it would have been necessary to establish if Spain had the right to

incorporate the island in its possessions and if it had effectively exercised this right. These were not, according to the arbitrator, established. Moreover, Mexico had not supported its claim of historic rights by any manifestation of sovereignty over the island.[20]

The arbitrator upheld the French claim and rejected the opinion that an occupation which is not effective cannot be the basis of taking possession. The decision of the court explained that the requisites of occupation had become more flexible, and what was required was an occupation which was appropriate and possible under the given circumstances.[21]

The third case in question is the legal status of Eastern Greenland case.[22] This case, like the previous two, was to examine what amount of authority had to be exercised over an unsettled island in order to establish possession. Norway, by a declaration of 10 July 1931, officially announced taking possession of Eastern Greenland which was, unlike other parts of the island, uncolonized by Denmark. Denmark, which had a claim of sovereignty over the whole of the island, raised a suit against Norway in the PCIJ.

Denmark contended that the area which was declared occupied by Norway was, at the time of occupation, subject to Danish sovereignty because it was a part of Greenland, and Denmark had sovereignty over the whole island. Danish propositions in support of this contention were that its sovereignty in Greenland had been continuously and peacefully exercised and had never been contested by any power. Moreover, Norway had recognized Danish sovereignty over Greenland as a whole.[23] Norway, on the other hand, submitted that Denmark had not colonized Eastern Greenland, and at the time of

Norwegian occupation, that area was terra nullius. Norway further maintained that the Danish attitude between 1915 and 1921, when it had approached various powers to have its position in Greenland recognized by them, was disagreeing with a claim to be already in possession of the sovereignty over the whole of Greenland.[24]

The court found sufficient evidence for the Danish claim of peaceful and continuous display of state authority over the island for many centuries, and particularly in 1915 when Denmark initiated measures to obtain the recognition of its title over Greenland by other states. The treaties applying to Greenland as a whole, and granting concession for trading etc., and legislation establishing the breadth of the territorial sea, were all, to the court, evidence of Denmark's will and intention to exercise sovereignty over the island. The court, accepting these treaties and concessions, and emphasizing will and intention to exercise sovereignty as evidence of effective occupation, pronounced:

> It is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other states could not make out a superior claim. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries. 25

One important feature of this case, which is usually neglected by those who try to apply it to the deep sea-bed area, is the relation between the effectiveness of occupation and the extent of competing claims of other states. The court, in its decision, took into account the fact that up to 1931 there was no claim by any power other than Denmark to the sovereignty over Greenland.[26]

These three cases, and in particular the Clipperton Island case, relinquished the effectiveness of occupation as an indispensable requisite for the acquisition of a title over a res nullius.[27] The advocates of the res nullius doctrine have focused on the cases mentioned above in order to validate the exploitation of the sea-bed resources.

The introduction of the Truman Proclamation in 1945, and the numerous claims of different coastal states over the sea-bed beyond the limits of territorial sea, re-opened the discussions about the legal status of the sea-bed and its resources. Those who defended the position of the sea-bed beyond the territorial sea as res nullius, cited arguments based on the aforesaid cases and the relativity of the effectiveness of the occupation. The question of the legal status of the sea-bed was extensively discussed in the International Law Association in its 43rd and 44th conferences.[28] The Rapporteur of the Committee for the Rights to the Sea-Bed and Subsoil, in his 1950 report with regard to the issuing of several proclamations claiming rights over the sea-bed and lack of objections to those proclamations, concluded that:

> These official documents appear to proceed on the assumption not only that the continental shelf is a res nullius but also that control and jurisdiction over this res nullius can be acquired without effective occupation being necessary. 29

The Rapporteur himself was of the opinion that the development was towards the recognition of the control and jurisdiction over the continental shelf as a right either vested ipso jure in the coastal state, or vested in that state by virtue of national occupation, e.g. by proclamation.[30]

Contrary to the general trend of thought at the beginning of the 1950s, which was in favour of a new basis for exclusive rights over the resources of the continental shelf, Waldock, in an article about claims of rights to the continental shelf, defended the basis of effective occupation. He wrote:

> It must now suffice to say that after the Island of Palmas, Eastern Greenland, and Clipperton Island cases, it seems impossible to maintain that actual settlement or exploitation is a sine qua non of effective occupation. Occupation, in the modern law, is the assumption of sovereignty rather than appropriation of property and these three cases lay down clearly that what is required is effective display of state activity in such a manner as the circumstances of the territory demand. 31

Another important article was written by Lauterpacht. With regard to the question of effective occupation, he wrote:

> The Clipperton Island case shows that the notion of occupation, as traditionally understood, may be valueless, in relation to some areas, for the purpose of acquiring title. Such areas are not only those which are uninhabited but also those which are normally uninhabitable. 32

In extending his argument to the sea-bed, he referred to the Clipperton Island and Eastern Greenland cases, and stated:

> They show that there are situations in which occupation, in the normal meaning of the words, is not required at all and in which the conception of the occupation is a more or less deceptive figure of speech. If this is so with regard to inhabited or sparsely inhabited territory, it is particularly true in relation to uninhabitable areas such as the seabed and its subsoil. 33

Lauterpacht further maintained that, in modern international law, effective occupation could not be considered as a stable condition for acquisition of title, and the requirement of effectiveness of occupation is a matter of degree.[34] By asserting this, he did not mean to extend the res nullius concept to the sea-bed but, on the contrary, he tried to prove that there was no need to rely on effective occupation to acquire title, because this

notion had lost its normal meaning. In response to those who claimed that issuing of proclamations is evidence of virtual occupation, he maintained:

> There is probably no more than dialectics in the attempt to combine the requirement of occupation with a denial of it by reducing it to a formal claim in the form of a proclamation. 35

The International Law Commission dealt with the question of the continental shelf from 1950 to 1956. The first thing to be established, in respect of the legal status of the continental shelf, was that this question and the issue of sedentary fisheries were different and should not be mixed. This view was held by many members of the Commission.[36] According to Brierly, in the case of sedentary fisheries, it was a question of a right acquired by occupation, while not the same in the case of the continental shelf.[37] It was generally accepted in the 1950s that the concept of res nullius could not be applied to the continental shelf, because numerous proclamations which had been issued since 1945 were evidence of claims of exclusive rights by the coastal states. The status of the continental shelf as res nullius would entitle any state, and not only the coastal state, to acquire rights over it, and that was inadmissible.[38]

The ILC, in its 1950 Report to the General Assembly, submitted that the right of a coastal state over the continental shelf was independent of the concept of occupation. The ILC's comments on the issue in 1953 and 1956 were on the same lines. In its 1953 Report to the General Assembly, the Commission held that:

> Once the seabed and subsoil have become the object of active interest to states with the view to the exploration and exploitation of their resources, it is not practicable to treat them as res nullius, i.e. capable of being acquired by the

first occupier. It is natural that the coastal states should resist such a solution. 39

The 1956 ILC Report to the General Assembly contains almost the same wording.[40] It is obvious from the texts of the ILC comments that, in the discussions concerning the legal basis of coastal states' rights over the continental shelf, the res nullius concept was used with respect to its original meaning in the Roman law. The Commission considered the effective occupation of the submarine areas in question as practically impossible and believed that the resources should not be handed to the fictional occupation either.[41]

It should be mentioned here that the Commission made a distinction between the sea-bed and its resources. What was discussed were the exclusive rights of the coastal states in respect of the exploration and exploitation of the natural resources of the continental shelf.

The Draft Articles concerning the continental shelf, prepared by the Commission, were adopted by the First United Nations Conference on the Law of the Sea in 1958, and were incorporated in the Convention on the Continental Shelf. There were a few references to res nullius in that Conference, all in rejection of the concept of res nullius as a legal basis for the exclusive right over the resources of the continental shelf.[42]

In short, while in the case of the sedentary fisheries, res nullius was applied with defective content both to the resources and the sea-bed, in the continental shelf case, this concept was applied to the resources of the sea-bed with its proper Roman law meaning, but was rejected as an alternative of rights to those resources. In fact, the sedentary fisheries were worked in the vicinity of the

coast and generally by the coastal state, res nullius and its effective occupation element assisted the coastal state in keeping the foreigners out. But, when the foreign occupation of the continental shelf, particularly the European rush to the Gulf of Mexico and its oil reserves, started, the concept of res nullius could not hold good any longer.[43] That was when the claim of an ipso jure right over the continental shelf based on "natural prolongation" and "adjacency" was born.

The proposal of Malta's representative to the General Assembly in 1967, which was inspired by the will for the reservation of the sea-bed for peaceful purposes and uses of its resources in the interest of mankind, was the starting point for the period of the sea-bed regime.[44]

Malta's proposal contained a new idea - the common heritage of mankind. It was, in this respect, similar to the proclamation of the President of the United States issued in 1945. The Truman Proclamation had been issued by the most powerful state in the world at the time, and its aim was, in fact, to safeguard the interests of the U.S. in the adjacent submarine areas. Malta's proposal was put forward by one of the smallest states of the world which spoke more on behalf of all poor developing countries than a nation in search of protecting its own interests. The ever increasing competition between the super powers in developing arms on the sea-bed as well as the rapid development of the sea-bed area technology, which made possible the use of the mineral resources of the sea-bed, had caused deep concern among all nations, but particularly the smaller, and Malta's proposal was the manifestation of that anxiety.

Unlike the Truman Proclamation, which gave the coastal state exclusive right over the resources of its continental shelf, Malta's proposal was an effort to keep the sea-bed beyond the limits of national jurisdiction out of the grasp of any individual state. Clearly, this could not be approved by those who had the technology and a great need for those mineral resources, and that was when the res nullius concept with its occupational element re-emerged in discussions and writings, because it could enable a few states with the required technology know-how and capital to exclusively exploit the sea-bed area and its resources.[45]

What is common between sedentary fisheries, resources of the continental shelf and the mineral resources of the sea-bed area beyond national jurisdiction, is the need of exclusive rights for a rather long time in order to develop and exploit them. It is particularly true about the minerals of the sea-bed area because, due to the amount of investment required, their economical exploitation would require exclusive rights to a single area of the sea-bed for exploration followed by extensive mining operation for a long period of time.[46]

In fact, in the course of discussion in the Sea-Bed Committee, later, in the UNCLOS III, it was never seriously held that the sea-bed area or its resources was res nullius. On the contrary, while some writers were trying to influence the course of discussion in the Sea-Bed Committee by bringing arguments in support of res nullius, many delegations in the Committee explicitly rejected this concept and its application to sea-bed mining.[47] The U.S., for example, repeatedly indicated that it did not consider the deep sea-bed resources as res nullius.[48]

The supporters of the res nullius here, too, based their arguments on the similarity of the sea-bed and unclaimed land (terra nullius). Richard Young, for example, in a speech before the American Society of International Law in 1968 mentioned:

> The existing customary law is, of course, rudimentary with respect to the deep sea floor. I would presume, however, that under this law it is possible in principle for a state to acquire rights of a territorial character over a portion of the floor through occupation. This view would accord with the general principles for the acquisition of territory on land, and supported in some measure by a limited amount of practice with respect to such resources as a sedentary fisheries. 49

He, nevertheless, concluded that with regard to the amount of the operations necessary to recover the resources, the conflicting uses and national interests involved, the existing legal base was not adequate.[50] Once again due attention was paid to the exclusive right of the coastal states to the sedentary fisheries as well as the relinquishment of the classical content of the effective occupation element. Moreover, at this stage, a new argument was added, based on the practice of states in respect to the emplacement of submarine cables and pipelines on the deep sea-bed which, according to the proponents of res nullius supports the validity of exclusive claims beyond national jurisdiction and thereby the applicability of the res nullius doctrine.[51]

Maybe the most outstanding illustration of this position was the filing of an application in 1974, with the office of the United States Secretary of State by Deep Sea Venture Inc., an American company, for registration of a notice of discovery and claim of exclusive rights in an area of the deep sea-bed in the Pacific Ocean.[52] The draftsmen of this document were also supporters of the applicability of the res nullius concept with regard to the deep

sea-bed minerals.[53] The claim was made for an area of 60,000 square kilometres which, after 15 years of exploration, would be reduced to 30,000 square kilometres for a 40 year period of exploitation.[54] It was asserted that the claim was validly established "under existing international law as evidenced by the practice of states, the 1958 Convention on the High Seas and general rules of law recognized by civilized nations".[55] The reference by the draftsmen of the Deep Sea Ventures Inc. to the practice of states was prima facie to the coastal state exclusive right upon the sedentary fisheries, as well as claims of sovereignty in the Island of Palms, the Clipperton Island and the legal status of Eastern Greenland cases. Reference to the Convention on the High Seas was due to the fact that the freedoms of the high seas were enumerated in this Convention, and the draftsmen by mentioning this Convention as one of the legal bases for their claim, made an effort to show that, while they believed in the principle of the freedom of the high seas and its applicability to deep sea-bed mining, they were of the opinion that this freedom was a qualified one in the sense that minerals were free to all as long as there was no claim, but as soon as the first claim was registered, the resources in situ, i.e., before their extraction, became the property of the claimer.[56] In this way, the draftsmen tried to make an analogy between manganese nodules and fish.[57] The difference seems to be that fish are res nullius and free until they are caught and owned, and only those fish become the fisherman's property and come into his profit, but manganese nodules need to come under the ownership of the one who gets title over them long before they reach the stage of exploitation, and besides, if we accept the res nullius status of

those resources, unlike fish, the number of which is decided by the size of the net, the quantity of manganese nodules is not determined by the capacity of the digging machine, but by the arbitrary decision of the holder of the title. What the draftsmen meant by general rules of law were those recognized by civilized nations practice relative to the systems of mining rights in areas such as Spitzbergen, South Africa and Australia, which had been peacefully exercised for some time.[58]

Efforts were made, in this claim, to make a distinction between the manganese nodules lying on the ocean floor, and the deep sea-bed itself; this was in order to combine the principle of the freedom of the high seas, which was the official position of the United States pending the coming into force of a new international agreement about the legal status of the sea-bed, with the necessity of claiming exclusive rights to the manganese nodules.

The whole of this claim and the frame of its registration at the office of the Secretary of State is based on a previous case from the turn of this century, namely, the case of mining claims in Spitzbergen as a terra nullius. The Spitzbergen islands were, since the time of their discovery at the end of the 16th century, the subject of contesting claims by the British, the Dutch, Russians, Canadians and Norwegians. These claims were generally for the right of sealing and whaling, or hunting for furs and oil. In the 19th century, even mining of coal was started by private persons without any state exercising sovereignty over the island. What the coal miners did in order to establish their exclusive right was to file a claim on a marked-out area, called a tract, with the foreign office of their respective countries. This regime and the

rights of private persons from different countries acquired in this way were recognized by all those states which had a claim on Spitzbergen. After World War I, the 1920 Treaty of Paris put an end to this regime, and recognized the Norwegian sovereignty over these islands.[59]

Goldie, in an article which was the basis of the Deep Sea Venture Inc. claim to an area of the deep sea-bed, made an analogy between the mining tracts in Spitzbergen and mining sites of the deep sea-bed, and claimed:

> . . . it can reasonably be argued that when an ocean bed resources of hard minerals has been developed and is being worked, the developing enterprise establishes, by that activity, a valid claim of right to an area equivalent to a tract on dry land. 60

In this analogy between unclaimed land and the deep sea-bed area, several assumptions have been made in order to arrive at a desired conclusion. The sea-bed, for example, is supposed to be similar to unclaimed land. It is also supposed that private persons can develop the deep sea-bed mining sites in the same way as they did in Spitzbergen, and then, as a result of this supposition, it is submitted that a notification by the private person to the foreign office of his country would suffice. Even if one accepts that the sea-bed is <u>res nullius</u> in the sense of an unclaimed land, it is generally understood, with regard to the previous practice of states in the case of sedentary fisheries or continental shelf, that only states may appropriate the deep sea-bed. Moreover, sporadic acts of some private persons in a few places in the world for a limited time cannot constitute the "general principles of law recognized by civilized nations".[61]

The Deep Sea Ventures Inc. claim, besides being filed with the office of the Secretary of State of the United States, was sent for notification to several states and a number of organizations and private persons. Canada, the United Kingdom and Australia rejected it and the United States, while repeating its official stand, i.e. the applicability of the principle of the freedom of the high seas, expressly declared that it did not "recognize exclusive mining rights to the mineral resources of an area of the sea-bed beyond the limits of national jurisdiction".[62]

That brings us to the conclusion that all arguments invoked by advocates of the res nullius concept as the basis of claim of exclusive right to the deep sea-bed resources are misrepresented. Examples in support of this position are almost always taken from the exercise of exclusive right on a piece of unclaimed land. There is no reason why these examples should be extended to the deep sea-bed. On the contrary, the weight of opinion is in support of rejecting such an extension. The rejection of this res nullius concept and its effective occupation element in the 1958 Convention on the Continental Shelf was a clear indication of the will and practice of states in this respect. The analogy with the case of sedentary fisheries is of no help either. It is true that both these fisheries and manganese nodules are exhaustible, but there are some differences between them. The sedentary fisheries, for example, have been worked in areas adjacent to the coast and, like oil fields of the continental shelf, it was reasonable to regard the coastal state as holder of title over them. Manganese nodules are generally found in the middle of oceans, and very far from the limits of any national jurisdiction. The only element of res

nullius which could be found in the manganese nodules, at least until 1970 when the Declaration of Principles was adopted by the General Assembly, was that they did not belong to any state or person. But unlike a res nullius, they were the subject of conflicting claims, and even if any claim to the res nullius status of those resources could have been considered before 1970, since that date the claim of title by the international community has certainly rendered that consideration impracticable.

Finally, it should be noted that the suggested analogy between manganese nodules and fish is a false one. The acceptance of the EEZ concept by most coastal states has diminished the importance of this analogy, because according to the EEZ regime, the greatest part of the fish will come under national jurisdiction.[63]

SECTION III: CLAIMS OF RIGHTS BASED ON RES COMMUNIS DOCTRINE AND FREEDOM OF THE HIGH SEAS

While res nullius was basically used to designate things which were found on land, the most significant example of res communis has been the sea. What is meant by res communis in civil law are things common to all; that is, those things which are used and enjoyed by every one, even in single parts, but can never be exclusively owned as a whole, e.g., light, air, running water, etc.[64]

The relation between res communis and access to the seas was elaborated by the father of modern international law, Grotius,[65] who defended free access in his famous book, The Freedom of the Seas,

which he wrote in 1604 in order to protect the Dutch interests against its enemy. Chapter XII of the book, under the title of "Mare Liberum", was published in 1609. The main purpose of that chapter was to justify the freedom of navigation for the purpose of trade. Speaking about the sea in his book, Grotius says:

> The sea is common to all, because it is so limitless that it cannot become a possession of any one, and because it is adopted for the use of all, whether we consider it from the point of view of navigation or of fisheries.

It is clear from "Mare Liberum" that the legal basis on which Grotius had built up the doctrine of the freedom of the high seas is that of res communis because it is an essential instrument to international navigation and trade. This connection between the res communis doctrine and the principle of the freedom of the high seas has not been necessarily held by many later writers, and the said principle has often been referred to as an independent principle from the res communis doctrine. It has even been regarded by some, in view of the exploitation of the resources of the sea-bed, as a totally independent alternative for the rejection of both res nullius and res communis doctrines.[66]

During discussions about the sedentary fisheries, the continental shelf, and later the sea-bed issue, there have been many writers supporting the view that the high seas and the land covered by it are indivisible, and the same legal regime should be applied to both. The conclusion generally is that the sea-bed, like the superjacent waters, is res communis and the principle of the freedom of the high seas applies to the sea-bed as well. For example, Higgins and Colombus, in their book of 1943, The International Law of the Sea, wrote:

> As regards the . . . [sea-bed], the better opinion appears to be that it is incapable of occupation by any state and thus its legal status is the same as that of the waters of the open sea above it. The same reason for maintaining it unappropriated in the interests of the freedom of navigation apply with equal force, to the bed of the sea. 67

During the debate about the continental shelf resources in the ILA and the ILC, there were a few scholars who argued that the legal nature of the sea-bed as something common to all human beings required an international administration of these resources. In 1950, Hsu, a member of the ILC said that he:

> . . . took a stand on the universally recognized principle that the high seas were the property of the international community. Why then not entrust the development of the continental shelf resources to the international community? Why not a joint exploitation of continental shelf resources? 68

The idea of the international administration of the resources of the sea-bed because of its status as res communis was, in 1951, taken up again by another member of the ILC, Spiropoulos, who expressed the view that:

> . . . he must repeat that the best solution would be the establishment of an international board for the protection of the resources of the sea. That board might be in some sort, a specialized agency. Such a course would enable the commission to achieve its purpose . . . 69

G. Scelle, a strong supporter of the unity of the high seas and the sea-bed, while criticizing the ILC for recognition of the sovereign rights of the coastal states in their continental shelf, wondered:

> . . . why the International Law Commission did not follow in this field [the continental shelf] the course it adopted with regard to fisheries on the high seas, whereby the necessary power of regulation is entrusted to an international administrative authority. 70

He further suggested:

> An international administrative authority set up within the framework of the United Nations shall be competent to deal with

> any application from natural or juridical persons supported by one or more governments, with a view to prospecting, investigating and exploiting the resources of the bed and subsoil of the high seas. 71

As regards the continental shelf, the opinion that this part of the sea-bed is res communis did not become very popular, and except for a few jurists who could not find any legal basis in the coastal state's claim over the continental shelf,[72] the prevailing opinion was that the rights to the resources of the continental shelf belonged, ipso jure, to the coastal state.

It should be noted that the adoption of a separate legal regime for the continental shelf by the ILC and in the 1958 Convention on the Continental Shelf did not prevent many writers from continuing to assert the unity of the sea-bed and superjacent waters, and this has been repeated since then quite often.[73] The result was that, when discussions about the exploitation of the mineral resources of the deep sea-bed started in the middle of the 1960s, the principle of the freedom of the high seas, as distinct from res communis, which had then been used more as signifying a common property rather than a common use,[74] and the applicability of that principle to the deep sea-bed and mining of its resources, was advocated by a group of states which were against the internationalization of the exploitation of these resources. One ground of these states was that, as the freedom of the high seas is extended to the air space above them too, there was no reason why it should not be extended to the deep sea-bed and its resources. In other words, the supporters of this approach, using an analogy, claimed that the principle of the freedom of the high seas should be automatically extended to the deep sea-bed. This was objected to by developing countries.[75]

Another ground was that the freedom of laying submarine cables and pipelines on the bottom of the high seas is evidence of the extension of the principle of the freedom of the high seas to that area.[76] The problem with these kinds of premises is that flying over the high seas and laying submarine cables and pipelines had been subject to many international negotiations, and there was virtually no protest against any state practice in those respects. That was why freedom of overflight and freedom of laying submarine cables and pipelines were adopted in Article 2 of the Convention on the High Seas as existing rules of international law. The exploitation of manganese nodules was, in the middle of the 1960s, a new possible activity, and there was neither state practice nor general agreement in that area to establish a rule of international law.

The advocates of the res communis doctrine, or the extension of the freedom of the high seas to the sea-bed, generally assert that neither the water nor the sea-bed can be the subject of appropriation on any sovereign right, but manganese nodules, like fish, can be appropriated.[77]

The principle of the freedom of the high seas and its applicability to the deep sea-bed was originally supported by some of the developed countries and the majority of the socialist states, which during the discussions at the Sea-Bed Committee took this position.[78] This view was strongly opposed by most of the developing countries. The source most often cited as evidence of the fact that the exploitation of deep sea-bed resources is a freedom of the high seas has been Article 2 of the 1958 Convention on the High Seas and the legislative history of that article. The article reads:

> The high seas being open to all nations, no state may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised under the conditions laid down by these articles and by other rules of international law. It comprises, inter alia, both for coastal and non-coastal states:
> (1)freedom of navigation;
> (2) freedom of fishing;
> (3) freedom to lay submarine cables and pipelines;
> (4) freedom to fly over the high seas. 79

The supporters of the extension of the freedom of the high seas to the deep sea-bed mining argue that the deliberate insertion of "inter alia", in Article 2 by its draftsmen is to render the list of freedoms non-exclusive. They further refer to the commentary on this article by the ILC where the Commission emphasizes that:

> The list of freedoms of the high seas contained in this article is not restrictive. The commission has merely specified four of the main freedoms, but it is aware that there are other freedoms, such as freedom to explore or exploit the subsoil of the high seas and freedom to engage in scientific research therein. 80

It seems that the "inter alia" clause in this article is a qualified expression, because after naming four of the freedoms, the draftsmen define "inter alia" as comparing "other freedoms which are recognized by the general principles of international law.[81] By this definition it becomes considerably clear that the "inter alia" clause does not include just any freedom, but only those which are recognized by the general principles of international law.[82] What was in the minds of the ILC members while drafting this article, as evident from their commentary, was freedom of scientific research and freedom of undertaking nuclear weapon tests on the high seas,[83] because there was some state practice in both cases. On the other hand, the question of exploitation of the resources of the sea-bed and subsoil beyond the limits of the continental shelf had not yet

assumed, in the opinion of the Commission, sufficient practical importance to justify special regulation.[84]

Since the purpose of the 1958 Convention on the High Seas, according to its preambular paragraph, was to "codify the rules of international law relating to the high seas", and because of that the provisions adopted in it were considered as "generally declaratory of established principles of international law", the non inclusion of freedom of exploitation of the sea-bed resources beyond the continental shelf confirms the fact that this freedom did not exist as a general principle of international law at that time,[85] and that Convention could not create rights regarding activities that at the time of its adoption were non-existent. Whereas in the ILC there were some discussions about the legal status of the sea-bed and the applicability of the freedom of the high seas to that area, in the 1958 United Nations Conference on the Law of the Sea Article 2 of the Convention on the High Seas was adopted with its "inter alia" clause without any discussion about the sea-bed beyond the limits of the continental shelf or any indication that deep sea-bed mining was meant to be one of those unnamed freedoms. Although some of those unnamed freedoms, such as the freedom of marine scientific research or freedom to construct artificial islands and other installations, are now integrated in the Convention,[86] the exploration and exploitation of the deep sea-bed resources have been the subject of the claim of the international community since the time the actual exploration and exploitation became feasible. The conclusion, therefore, is that deep sea-bed mining, because of the lack of state practice, was neither meant to be one of those unnamed freedoms in the list of the ILC or Article 2

of the Convention on the High Seas, nor has it been accepted as one of the freedoms of the high seas since the adoption of that Convention. The principle of the freedom of the high seas originally concerned non-resources of the sea, i.e., navigation. Although it was equally applied in the case of fishing, which is a resource use of the sea, it continued to expand and enclose other non-resources uses such as overflight, marine scientific research and discussions about deep sea-bed mining, and efforts have been made to extend this principle to the new resource use of the sea. Resistance to and protests against these efforts came from both developing and developed countries. Canada, for example, in an intervention at the Sea-Bed Committee in 1971 said:

> . . . the concept of the freedom of the high seas, as it developed over the succeeding centuries, had become tantamount to a roving jurisdiction - sovereignty following the flag - for those who were powerful enough to make their wishes felt. 87

Again in 1972, speaking about the same subject, the representative of Canada at the Sea-Bed Committee said:

> While there are those who lament the death of the traditional unrestricted freedom of the high seas, there are many more who rejoice that the traditional concept of freedom of the high seas can no longer be interpreted as a freedom to over-fish, a licence to pollute, a legal pretext for the unilateral appropriation of the sea-bed resources beyond national jurisdiction. 88

New Zealand also made statements to the same effect.[89] The protests of the developing countries were caused by different considerations. The main concern of the Latin American countries was the exclusion of foreigners from their claimed fishing zone; so they insisted on the restrictions to the principle of the freedom of the high seas. Asian and African countries, on the other hand, were generally concerned about the exploitation of the mineral

resources of the sea and the claims of maritime powers such as the United States, the United Kingdom and the Soviet Union concerning the applicability of the principle of the freedom of the high seas to deep sea-bed mining. The representative of Ecuador to the Sea-Bed Committee in 1972 criticized the freedom of the high seas as something related to the surface of the sea and needed by the colonial powers in order to carry out their trade without hindrance.[90] Tanzania emphasized, in 1974, the necessity of challenging the freedom of the seas as a dogma, and maintained that:

> It had become a catchword and an excuse for a few countries to exploit ruthlessly the resources of the sea, to terrorize the world and to destroy the marine environment. That type of freedom belonged to the old order and had outlived its time. True liberty struck a balance between rights and obligations. 91

There were many other statements from developing countries in the same line rejecting the principle of the freedom of the high seas as regards the marine resources either in the superjacent waters or on the sea-bed.[92] These protests have served two functions. Firstly, they are evidence that deep sea-bed mining has never been one of the freedoms under customary international law, and secondly, they have prevented the exploitation of the deep sea-bed mineral resources from becoming recognized as a freedom of the high seas.

SECTION IV: EVALUATION

It can be concluded that, as regards deep sea-bed mining, the arguments normally attributed to the developed countries in support of their claims of rights are restrained.

The mineral resources of the deep sea-bed are not res nullius for several reasons:

1- They are exhaustible, and one should get title over them long before they can be actually exploited;

2- They have been, since the time of their recognition, subject to contesting claims, because of their assumed exhaustibility.

3- They should be exploited on an exclusive basis.

4- They cannot be likened to sedentary fisheries, because one of the basis of rights to have fisheries was, in fact, adjacency, and the same holds true in the case of the resources of the continental shelf. The exclusive right of the coastal state to them was reasonable. The minerals of the deep sea-bed are too far from the limits of any national jurisdiction. Any national claim to them based on sedentary fisheries practice is, thus, unwarranted.

Those who advocate the concept of res communis either as common property or common benefit, justify the exclusive rights of states to sedentary fisheries, and presumably now to deep sea-bed mineral resources, on the basis of prescriptive title or a title acquired by acquiescence of other states. In the case of deep sea-bed mining, this argument is groundless because of the frequency of protests to any deep sea mining operation by individual states or juridical persons. These Latin expressions, which discussed the legal status

of the high seas, have been replaced by the concept of the common heritage of mankind. This latter concept, at least until 1970, was adopted unanimously by the members of the United Nations General Assembly as mutatis mutandis and applicable to the legal status of the deep sea-bed and its resources. The Latin expressions were even rejected by the ILC during discussions concerning the continental shelf.[93] Their later use in the discussions about deep sea-bed mining was also rejected by the majority of states and scholarly opinion.[94] The content and the value of these expressions have always varied according to the interests of the great maritime powers. We share Henkin's view that these expressions are used as labels to justify a predetermined result.[95]

The extension of the principle of the freedom of the high seas to deep sea-bed mining seems to lack convincing support in international law. The reference to Article 2 of the Convention of the High Seas to support such an extension is unwarranted, because deep sea mining, due to the continuous protests of many, has never attained the status of a freedom recognized by the general principles of international law.

The comparison of manganese nodules with fish is strained too, asthere are indeed more differences than similarities between these two. While fish are considered as renewable, manganese nodules are generally assumed to be exhaustible. Catching fish does not necessarily need sophisticated means and every state can more or less exercise his right of fishing, but exploitation of the deep sea resources requires a technology which is owned by a very limited number of states. Fishing in the high seas does not need an

exclusive right to a large area for a long time, whereas exploitation of minerals requires all these conditions. Finally, Henkin rightly criticizes the analogy between fishing and deep sea-bed mining by saying that:

> The answer given to the problems of navigation, or fishing or even pearl fishing or subsoil mining, do not dictate the answers that should apply to elaborate operations for digging for manganese in the mid oceans. 96

Footnotes - Chapter Three

1. H.C. Black, Black's Law Dictionary, 5th edition, pp.1173-1175. West Publishing Co., 1979.

2. Ibid.

3. See F.V. Garcia Amador, The Exploitation and Conservation of the Resources of the Sea, p.14. Leyden: Sijthoff, 1959.

4. Ibid.

5. Sedentary fisheries are a special class of fish which have constant contact with the sea-bed and are considered to belong to the sea-bed rather than the sea. They include oyster, coral sponge, pearl, amber, etc. They are normally found in shallow waters.

6. See Higgins and Colombus, International Law of the Sea, p.65. London: Longmans, 1945.

7. Vattel, The Law of Nations or The Principles of Natural Law, 1758, 2 Fenwick trans. 107, 1916.

8. Sir C.J.B. Hurst, "Whose is the Bed of the Sea?", 4 BYIL (1923-24), pp.34-43.

9. Ibid.

10. E.D. Brown, The Legal Regime of Hydrospace, p.83. London: Stevens and Sons, 1971; D.P. O'Connell, The International Law of the Sea, Vol. I, p.457. Oxford: Clarendon Press, 1982.

11. In a recent article, for example, it is maintained that in the 15th and 16th centuries, the res nullius concept was applied to the surface of the sea and effective occupation over it was claimed by some states. An example of this practice is the claim of England to the North Sea and the Channel, Sweden to the Baltic Sea, Denmark and Norway to all the northern seas, and finally claims of Spain and Portugal to the Pacific and Atlantic oceans respectively. See D.W. Arrow, "The Customary Norm Process and the Deep Sea-Bed", 9 ODIL (1981), p.12.

    The sea, in none of these cases, is treated as res nullius, either in its Roman law meaning or in its more recent usage in the case of sedentary fisheries, because the claims in all these cases were to exclusive navigation or fishing in the sea which, unlike birds, wild animals, or sedentary fisheries, which resources were used, long before these claims, by all nations. Moreover, the concept of effective occupation cannot be reasonably applied to the sea which has an ever changing character.

12. See G. Schwarzenberger, A Manual of International Law, 6th edition, pp.97-98. Oxon: Professional Books Ltd., 1976.

13. Arbitral award rendered in conformity with the special agreement concluded on January 23, 1925 between the United States of America and The Netherlands relating to the arbitration of differences respecting sovereignty over the Island of Palmas, 4 April 1928, reproduced in 22 AJIL (1928), pp.876-912.

14. Ibid., p.867.

15. Ibid.

16. Ibid., p.910,

17. Ibid., p.908.

18. Ibid., p.911.

19. Arbitral award on the subject of disputes over Clipperton Island (France v. Mexico), January 28, 1931, 26 AJIL (1932), p.390.

20. Ibid.

21. E.D. Dickinson, "The Clipperton Island Case", 27 AJIL (1933), pp.130-133, at p.133.

22. PCIJ Series A/B, No. 53, 1933.

23. Ibid., p.44.

24. Ibid., p.45.

25. Ibid., p.46.

26. Ibid.

27. While Clipperton Island could be termed as terra nullius, it is difficult to apply the same term to Palmas Island which was populated at that time.

28. See 1948 ILA Report, pp.168-206, and 1950 ILA Report, pp.87-138.

29. 1950 ILA Report, p.131.

30. Ibid., p.32.

31. C.H.M. Waldock, "The Legal Basis of Claims to the Continental Shelf", in 36 Grot. Trans. (1950), p.141.

32. H. Lauterpacht, "Sovereignty over Submarine Areas", 19 BYIL (1950), pp.417-18.

33. Ibid., p.421.

34. Ibid., p.416.

35. Ibid., p.420.

36. YBILC (1950), Vol. 1, pp.208-211.

37. Ibid., p.209, para. 12.

38. Ibid., p.227, para. 8a.

39. YBILC (1953), Vol. 11, p.215, para. 73.

40. YBILC (1956), Vol. 11, p.298, para. 8.

41. YBILC (1951), Vol. 11, p.142, para. 5.

42. See, e.g., Statements of the representative of Argentina, Official Records of the UNCLOS I, Vol. IV, pp.2-3.

43. YBILC (1951), Vol. 1, p.407.

44. UN Doc. A/C.1/PV.1515.

45. G. Biggs, "Deep Sea-Bed Mining and Unilateral Legislation", 8 ODIL (1980), p.236.

46. L. Henkin, Law of the Sea's Minerals Resources, p.25. New York: The Institute for the Study of Science in Human Affairs of Columbia University, 1968.

47. See UN Doc. A/C.PV.1593, para. 14 (Norway); UN Doc. A/C.1/PV.1597, para. 26 (Libya); UN Doc. A/C.1/PV.1588, paras. 148-49 (Ceylon) in 1968; UN Doc. A/C.1/PV.1913, para. 62 (Zaire) in 1972.

48. Biggs, op. cit., p.239.

49. R. Young, "The Limits of the Continental Shelf and Beyond", 62 Proc. ASIL (1968), pp.232-234.

50. Ibid., p.234.

51. For discussion about these arguments and their rejection, see Arrow, op. cit., pp.13-16.

52. Notice of Discovery and Claim of Exclusive Mining Rights, and Request for Diplomatic Protection of Investment by Deep Sea Ventures, reproduced in XIV ILM (1975), pp.51-56.

53. C.E.E. Goldie has written many articles in defence of the res nullius position; see, e.g., "A General International Law Doctrine for Seabed Regimes, I.Law. (1973), p.796.

54. Notice of Discovery, op. cit., pp.52-53.

55. Ibid., p.53.

56. This part is particularly elaborated by Goldie, "A General ...", op. cit., p.815.

57. Goldie has made some distinction between the fish and manganese nodules; see Goldie, "Customary International Law and Deep Seabed Mining", 6 Syr.JIL.Com. (1978-79), pp.178-98.

58. For comment, see Goldie, "A General . . .", op. cit., pp.796-824.

59. For a detailed account of the Spitzbergen regime, see Goldie, id., pp.807-811, id., Customary, pp.175-79; and C.H. Fleischer, "Le regime d'exploitation du Spitzberg (Svalbard)", in XXIV Annuaire francais (1978), pp.275-300.

60. Ibid., p.812.

61. Lord Phillimore, one of the authors of Article 38(1)(c) of the ICJ state, in commenting on this article pointed out: "The general principles referred to . . . were those which were accepted by all nations in foro domestico, such as certain principles of procedure, the principle of good faith, and the principle of res judicata, etc." See D.J. Harris, Cases and Materials on International Law, p.45. London: Sweet and Maxwell, 1979.

62. See XIV ILM (1975), p.66.

63. R.J. Dupuy, The Law of the Sea: Current Problems, p.121. New York: Oceana, 1974.

64. Black's Law Dictionary, op. cit., pp.1173-1175.

65. The so-called "father of international law" was Hugo Grotius (1583-1654), whose reputation and influence have been world-wide, and whose principal works have been translated and commented upon. Born in Holland, Grotius was a child prodigy, entering the University of Leyden at 11, and being admitted to the practice of law at 16. He was also a theologian, poet and historian. In 1623 and 1624, he wrote his great book, the Law of War and Peace (De Jure Belli ac Pacis), in which he deals with the problems of "just" war and in 1629 he proclaimed the freedom of the seas in an elaborate argument in Mare Liberum (Open Sea), defending the right of the Dutch to navigate the Indian Ocean which Portugal claimed as its exclusive territorial waters. He was answered in 1635 by John Selden, in Mare Clausum (Closed Sea).

66. See Lauterpacht, op. cit., p.414.

67. Higgins and Colombus, op. cit., p.54.

68. YBILC (1950), Vol. 1, pp.215-216, para. 82.

69. YBILC (1951), Vol. I, p.304, para. 28.

70. YBILC (1955), Vol. I, p.7, note 16.

71. Ibid.

72. Ibid.

73. I. Brownlie, Principles of Public International Law, p.222. Oxford: Clarendon Press, 1979.

74. A.M. Post, Deep Mining and the Law of the Sea, p.89. The Hague: Nijhoff, 1983.

75. UN Doc. A/AC.138/SR.1-9, p.17.

76. G. Schwarzenberger, "The Fundamental Principles of International Law", 87 RDC (1955-I), pp.195-383, at p.360.

77. Henkin, op. cit., p.30.

78. UN Doc. A/AC.135/SR.1.1, p.15.

79. UNTS, Vol. 450, p.80.

80. YBILC (1956), Vol. 11, p.278.

81. 1958 Convention on the High Seas, Article 2.

82. Biggs refers to the principle of the freedom of the seas and says: "Certain authors, however, have asserted that every new ocean activity made possible by the progress of science would automatically become included . . . by the above doctrine [freedom of the seas]. Under this theory, the freedom of the seas would be a generic principle analogous in a way to that of economic free enterprise in accordance to which every new activity would be permitted unless specifically prohibited." G. Biggs, "Deep Seabed Mining and Unilateral Legislation", 8 ODIL (1980), pp.223-257, at p.228.

83. YBILC (1956), Vol. 11, p.278.

84. Ibid., pp. 9, 278; YBILC (1956), Vol. 1, p.11, para. 33. Although in the title of the subjects of discussion at the ILC, "the exploitation of the sea-bed and subsoil of the high seas"is mentioned, in the commentaries only the subsoil of the high seas are discussed. The reason is obviously that at that time the exploitation of manganese nodules which lie on the

deep sea-bed was unthinkable, but the exploitation of the subsoil starting from the main land was in process at a depth of up to 1100 metres in Chile, France and England.

85. Biggs, op. cit., p.233.

86. See The Convention Article 87(d) and (f).

87. UN Doc. A/AC.138/SR.63, p.32.

88. UN Doc. A/AC.1/PV.1906, para. 42.

89. UN Doc. A/AC.138/SR.62, p.18.

90. UN Doc. A/AC.138/SR.80, p.30.

91. Off. Rec., Vol. I, p.93, para. 67. The strong opposition expressed by the majority of states to the applicability of the principle of the freedom of the high seas to the deep sea-bed mining pointed out the fact that even if such freedom could have been conceived before 1967, it ceased to exist after that date because, as Henkin rightly observes "an existing norm cannot survive unchanged if many states combine to reject or flout it. See Henkin, "The Changing Law of Sea-Mining", 4 Annales d'etudes internationales (1973), pp.281-305, at p.292.

92. See, e.g., UN Doc. A/C.1/PV.1851 (Malta); Off. Rec., Vol. V, p.106 (Madagascar), ibid.

93. YBILC (1950), Vol. 11, pp.384-89.

94. Although res nullius and res communis were never seriously considered in the course of official negotiations concerning the legal status of the deep sea-bed, there have been some attempts to redefine at least res communis to suit the new situation. Post, e.g., believes that res communis "in more recent years has been referred to as a justification for common ownership, e.g., as regards international control of international public good such as the area and resources of the high seas, including manganese nodules". See Post, op. cit., p.89.

95. See Henkin, op. cit., p.29.

96. Ibid.

CHAPTER FOUR

THE PRINCIPLE OF THE COMMON HERITAGE OF MANKIND

SECTION I: THE PROPER CONCEPT

The concepts of res nullius and res communis proved to be inadequate as grounds for claims of rights to the resources of the continental shelf so, when in the 1960s, technological developments made it possible to explore and exploit the ocean floor resources, doubts were expressed as to the appropriateness of having recourse to those concepts and their application to the new situation. That was when the concept of the common heritage of mankind was born to meet the challenges of a new period in international affairs. The whole of Part XI of the Convention, with its related annexes which deal with exploration and exploitation of the deep sea-bed resources, is principally based on this concept. The common heritage of mankind is meant not only to define the legal status of the deep sea-bed and its resources, but also to govern the whole system and machinery for the management of those resources. In this chapter we shall embark on the study of how this concept developed into a general principle in respect of the international law of the sea-bed area and the implications of that principle on the legal status of the deep sea-bed.

SECTION II: DEVELOPMENTS DURING 1967-1970

The concept of the common heritage of mankind since it was introduced in the agenda of the General Assembly of the United Nations in 1967 until 1970, when through the adoption of the Declaration of Principles by the General Assembly it was formally proclaimed as a general principle governing the sea-bed area and its resources, went through many developments as regards the elaboration of its definition and the implications of its influence on the exploitation of the sea-bed and its resources. These developments will be dealt with in the following sections of this chapter.

SECTION III: MALTESE INITIATIVE

The initiative at Malta to the 22nd session of the UN General Assembly in 1967 concerning the insertion of a new item in the agenda entitled:

> Declaration and treaty concerning the reservation exclusively for peaceful purposes of the sea-bed and of the ocean floor, underlying the seas beyond the limits of present national jurisdiction and the use of their resources in the interest of mankind 1

was accompanied by an explanatory memorandum in which Malta had stressed the fear of national appropriation of the ocean floor beyond the continental shelf because of rapid technological development, and as a result a militarization of the ocean floor and the exploitation of its resources by a few technologically advanced countries. Malta, therefore, felt that the time had come to

declare the ocean floor as the common heritage of mankind, and further suggested that immediate steps should be taken to draft a treaty embodying the following principles:

> 1- The seabed and ocean floor beyond the limits of present national jurisdiction are not subject to national appropriation; 2- The exploration of the seabed and ocean floor should be undertaken in a manner consistent with the principles and purposes of the charter of the United Nations; 3- The use of the sea-bed and the ocean floor and their economic exploitation shall be undertaken with the aim of safeguarding the interests of mankind, and the financial benefits from such exploitation should be used primarily to promote the development of poor countries; 4- The sea-bed and ocean floor shall be reserved exclusively for peaceful purposes. 2

Although it was the first time that such a proposal containing the principle of the common heritage of mankind was put forward at the General Assembly, the idea was not new. The 1930 Hague Conference for the codification of international law had referred to the resources of the sea as "common patrimony".[3] Apart from the deliberations of George Scelle and some other members of the ILC at the beginning of the 1950s about the preservation of the interests of humanity as a whole in regard to the exploitation of the resources of the continental shelf,[4] there were some statements in different forms during 1966 and 1967 in support of internationalization of the sea-bed and control of the United Nations over the non-living resources of the ocean.[5] One year before Malta's proposal, in a symposium at the The Law of the Sea Institute of the University of Rhode Island, Quincy Wright had said: "The sea and its bed should be considered a heritage of mankind, and as its utilization proceeds, all should share equitably in its benefits".[6]

President Johnson, too, in 1966, in a speech on the occasion of commissioning the navy research vessel "Oceanographer" had stated: "We must ensure that the deep seas and the ocean bottoms are, and remain, the legacy of all human beings".[7] Just one month before the submission of Malta's proposal to the General Assembly, on 13 July 1967, the World Peace Through Law Center held a conference with legal experts participating from 100 countries. The preambular paragraph of Resolution 15 of this conference reads:

> Whereas new technology and oceanography have revealed the possibility of exploitation of untold resources of the high seas and the bed thereof beyond the continental shelf and more than half of mankind finds itself underprivileged, underfed and underdeveloped, and the high seas are the common heritage of mankind . . . 8

All these previous references to the interest of the world community in the sea and its resources, notwithstanding the credit of the introduction of the common heritage of mankind as a new concept in international law, should be given to Arvid Pardo, the then representative of Malta to the United Nations. This was a new and at the same time generic concept which contained elements that were missing in the previous established expressions and principles. It could both define the legal status of the deep sea-bed as belonging to mankind and provide for the principles according to which the exploitation of the deep sea resources could take place.

(a) Reactions to the Maltese Initiative

The first reactions to the Maltese initiative were varied. Some considered it as premature and ill-advised.[9] Some regarded

the Maltese as acting for the British.[10] Most developing countries supported the Maltese plan on the sea-bed issue.[11] All countries, developing or developed, shared, albeit for different reasons, the interest of having an international arrangement for the uses of the deep sea-bed. That was why the General Assembly, pursuant to discussions concerning the Maltese initiative, established, by Resolution 2340 (XXII) of 18 December 1967, the Ad Hoc Committee to study the issue and various aspects of the item entitled:

> Examination of the question of the reservation exclusively for peaceful purposes of the sea-bed and the ocean floor, and the subsoil thereof, underlying the high seas beyond the limits of present national jurisdiction, and the use of their resources in the interests of mankind. 12

(b) The Content of the Maltese Initiative and the Item before the Sea-Bed Committee

There were two major issues involved in the Maltese initiative and later in the item before the Ad Hoc and Sea-Bed Committees. The first was the question of demilitarization of the sea-bed, and the second was the concern for the exploitation of the mineral resources in a way that the interests of the whole of humanity could be safeguarded. Both in view of the fact that the concept of the common heritage of mankind entailed, as an inherent part of it, the peaceful exploitation of the deep sea-bed,[13] and because of the work of the Conference of the Eighteen-Nation Committee on Disarmament, as well as the reluctance of the great maritime powers, the first issue was soon overshadowed by the question of exploitation of the deep sea resources.

The title of the item, both as it was introduced by Malta and as it was reformulated in later General Assembly agenda or resolutions, became the source of different interpretations. At the time of the presentation of Malta's initiative, a great part of the continental margins was still considered beyond the limits of national jurisdiction. It was, therefore, natural that the sea-bed and ocean floor, instead of ocean floor alone, be distinctively indicated. But some states argued that this separate indication should be interpreted as a reference to separate regimes for the bed of the enclosed or semi-enclosed seas and the deep ocean floor, thus distinguishing between sea-bed and ocean floor. Another point of difference was the expression "underlying the high seas" in the title of the item. Some states contended that, as high seas were outside the territorial sea, the area underlying the high seas was outside of state sovereignty and the principle of the freedom of the high seas was applicable there.[14] This opinion was not shared by those who advocated a new legal regime for the deep sea-bed.

Apart from these differences of opinion about the content of the title of the item, there were disagreements about the legal status of the deep sea-bed and the system of the exploitation of the deep sea resources.

A great number of countries, mostly developing, contended that there existed a legal vacuum in the deep sea-bed,[15] and the concept of the common heritage of mankind, which transcended res nullius, res communis and other concepts, was to fill up that vacuum. Some other states, mainly industrialized countries, were of the opinion that the legal regime of the high seas or the

principles of international law embodied in the charter of the United Nations were applicable to the deep sea-bed.

SECTION IV: MALTA AND THE COMMON HERITAGE OF MANKIND

Malta announced the resources of the deep sea-bed as a common heritage of mankind without making any effort to provide a definition for this concept. That left different countries with the option of interpreting the concept the way their interests dictated. But, later on, the Government of Malta tried to elaborate what the objective was by submitting the item to the General Assembly and announcing the resources of the deep sea-bed as the common heritage of mankind. The first effort in that respect was the answer of Malta to a note verbale of the Secretary-General about the functions and duties of the Ad Hoc Committee. In this letter, Malta submitted that the objective was:

> Preservation of the international character of the sea-bed and ocean floor and of their sub-soil underlying the high seas beyond the limits of present national jurisdiction, not as res omnium communis, usable for any convenient purpose and the resources of which are indiscriminately and competitively exploitable, but through the acceptance by the international community of the principle that these vast areas of our planet have a special status as a common heritage of mankind, and, as such, should be reserved exclusively for peaceful purposes and administered by an international agency in the name and for the benefit of all people and of present and future generations. 16

Malta was, at the same time, aware that the concept of the common heritage of mankind was new to the international law which had developed over the centuries; it was, nevertheless,

convinced that the introduction of this concept and its eventual extension to other environments rather than the deep sea-bed, was essential for the effective solution of the problems of universal concern and the peaceful development of mankind.[17]

The major implications of this concept, in Malta's view, were that, firstly, the common heritage can be used but not owned. In this respect, there is a similarity between common heritage and res communis in its Roman law sense. Pardo believed that it was not wise to use "property" instead of "heritage", because, in his opinion, property was a form of power and since Roman law times it had implied jus utendi et abutendi (right to use and misuse).[18] Secondly, the use of common heritage required a balanced system of management. This is different from the management of a res communis, which can be fulfilled by each individual state or person. Thirdly, common heritage implies an active sharing of benefits, which is again different from the case of a res communis. Fourthly, this concept implies reservation for peaceful purposes, and finally it promises reservation for future generations.[19] These last two implications are also new and different from the case of res communis. In an earlier statement, the representative of Malta had stressed that the common heritage implied peaceful use, freedom of access, regulation of use to conserve the heritage and avoid infringements of the rights of others and equitable distribution of the benefits of exploitation.[20] Pardo, thus, submits that Malta considered common heritage as implying a notion of common use of or access to a certain property but not common ownership.[21] This, as well as other implications of the principle were extensively commented on and gradually elaborated by other countries.

(a) Opponents of the Common Heritage of Mankind Concept

Under this title, at least between 1967 and 1970, when the Declaration of Principles was adopted by the General Assembly, one can generally name two groups of states. The first group comprised some of the industrialized countries with deep sea mining technology and the second group consisted of the Soviet Union and other socialist states.

The first group generally considered this concept devoid of any legal content and contrary to existing norms and principles of international law, meaning the principle of the freedom of the high seas. They also contended that this concept could not be understood until its implications were spelled out.[22] It was further asserted that, because of the difficulties which could arise in the formulation of legal norms, "the good of mankind" or "the common interest of mankind" should be preferred to the word "heritage".[23] Another criticism of these countries was the imprecision and novelty of the concept. Belgium even referred to it as neologism and a concept that meant different things to different people.[24] Just like the case of the continental shelf, there was no claim of sovereignty or sovereign rights to the deep sea-bed or its subsoil, but these countries insisted on the freedom of access to and use of the resources without any discrimination. They referred to the similar propositions in the Outer Space Treaty,[25] and argued that there should be a clear distinction between non-appropriation of the sea-bed on the one hand and the exploitation or use of it on the other.[26]

Many states in this group consistently rejected the equation of the word "heritage" with "property", and the statement that the resources of the deep sea-bed belong to the world community.[27] Still, there were some other states in the same group which were more receptive to the concept of common heritage, though with an interpretation different from that of the developing countries. For these states, common heritage could equally be called the common property of mankind,[28] common possession or international public domain, because they all were variants of the same idea. The point was that to them the common heritage concept did not contain clear juridical significance.[29]

The second group, comprising the majority of the socialist states, reacted to the common heritage principle almost in the same manner as the capitalist states. They rejected this concept as a notion lacking clarity and substance from the standpoint of international law. In response to those who interpreted common heritage as common property, the socialist states expressed the view that such an interpretation failed to take into consideration the realities of the contemporary world. The fact, according to the Soviet representative to the General Assembly in 1968, was that there co-existed states with different social structures and different systems of ownership.[30] Bearing that in mind, he asserted that thinking of the common heritage in terms of collective ownership was just an illusion and the whole idea was utopian.[31] The Soviet Union, in its later interventions at the Sea-Bed Committee and the General Assembly, repeated this position, and with regard and, in fact, in response to the arguments that this concept could prevent appropriation of the sea-bed by states possessing the

technical means to exploit the resources of the sea-bed, emphasized that such a collective ownership would be dangerous, because it would enable various "inheriters" to lay claim to part of that area and invite the risk of national appropriation or the extension of state sovereignty to various regions of the sea-bed.[32] Essentially, the Socialist countries, unlike the western industrialized countries, insisted that there was no legal lacuna in the sea-bed, and the charter of the United Nations provided the basis for the relations among states in all spheres, and creating a special legal status for the sea-bed would mean that the legal status of this area was different from that of the superjacent waters.[33]

The alternative of the socialist states for the common heritage of mankind was, thus, the same as that of the technologically advanced countries of the West, namely the principle of the freedom of the high seas and the legal norms established by the Convention on the High Seas.[34] From the viewpoint of the socialist states, the more realistic interpretation of the common heritage concept was that the sea-bed beyond the limits of national jurisdiction should be used jointly by all states without any appropriation of that area by any state or person.[35] Reinterpretation by the Soviet Union of the common heritage, in a more concrete form, was that the sea-bed is at the general disposal of all states and not subject to any appropriation.[36] This interpretation clearly equates the concept of the common heritage of mankind with the res communis omnium and its ensuing principle of the freedom of the high seas.

(b) Supporters of the Common Heritage of Mankind

The most distinguished group of states to come under this heading is that of the developing countries; but it would be a mere simplification, if not negligence, to consider these countries as the sole supporters of the principle of the common heritage of mankind. Many of the developed states, e.g. the Nordic countries, Switzerland and Austria, also supported this principle. Nevertheless, the focus here will be on the position of the developing countries.[37]

The introduction of Malta's initiative in 1967 coincided not only with the emergence of concrete problems in the economic development of the Third World countries but also with the emergence of a rather loose unity of these countries under the title of the Group of 77. It is, therefore, no wonder that the idea of the vast resources of the deep sea-bed as the common heritage of mankind was received so strongly by the G77 as a means of fulfilling their aspirations for creating a New International Economic Order. A great number of the countries in this group were formerly colonized by some of the technologically advanced countries, and considered their economic backwardness a result of the policy of exploitation carried out under the colonial system. Being aware of their rights as independent states, they saw in the common heritage concept a chance to have those rights prevail in order to change that unjust situation.[38] They hoped that the benefits derived from deep sea-bed exploitation could help to mitigate the harsh inequalities between them and the developed countries.[39] They saw, in deep sea resources, the prospects for the correction of a historic

"imbalance", of which they considered themselves to be victims.[40] For the G77, the basic implication of the concept of the common heritage of mankind was that, in deep sea mining, the benefit of all should prevail over the interest of a few great powers. For them, the common heritage principle was unlimited and wholly independent of any qualitative provisions, from which many other principles and rules could be deducted.[41] This view was clearly in contrast to the standpoint of the industrialized countries which had taken a pragmatic approach to the problem, and stressed "the facts of international relations, i.e. the de facto differences among states".[42]

The G77 consisted mainly of three regional groups of countries from Latin America, Asia and Africa. In the Latin American group, there were several countries which had claims of 200 nautical miles of territorial sea.[43] For these countries, the concept of the common heritage, which had a direct relation to the limits of national jurisdiction, could mean a reduction to their territorial sea. It was more essential to them to have their claim to an extended territorial sea recognized by the international community and to enjoy the benefits of their adjacent seas than to pay homage to a common heritage principle which was yet to be clarified.[44] Although these countries never failed to support the common heritage concept, after the recognition of the EEZ concept by the majority of states, which guaranteed a preferential right to marine resources of up to 200 nautical miles for the coastal state, they intensified their efforts for the consolidation of the common heritage concept into concrete legal rules. One should not forget that the developing countries did not constitute a unified and

homogeneous group of states, but in the case of deep sea-bed mining and the common heritage of mankind, their differences notwithstanding, they were mostly regarded as the G77 with a specific economic goal, i.e., the establishment of a New International Economic Order.[45]

The G77 considered the common heritage of mankind as a revolutionary concept symbolizing their awareness and realization of the realities of the sea, and part of a philosophy which sought to inaugurate a new international order in which equality and justice would not be vain words.[46] Generally speaking, this group of countries admitted that the precise legal implications of the common heritage principle were unclear, and had to be developed,[47] but they themselves contributed most to this development.[48] From the outset, it was clear that, for this group, the common heritage of mankind implied a notion of ownership, a property owned by mankind in the sense that, unlike res communis, none might take any part of it without the consent of all. This assumption was followed by several propositions. It was asserted that the common ownership required a joint sovereignty over the deep sea-bed.[49] The result was also that there should be equitable participation of all states in the administration of the common heritage. Mankind could not be represented by just a few developed countries with the necessary technology and know-how.[50] The common ownership and common administration would logically lead to the sharing of benefits on an equitable basis. Here, the G77 had a claim of preferential right in view of their needs.[51] An equitable sharing of the benefits would contribute to the realization of the goals of the NIEO. No matter how the word "mankind" was to be defined, it was asserted by

the G77 that there was a question of representation involved, and an international organization had to be set up to act on behalf of mankind for the management of its property. In brief, the common heritage concept, as the Yugoslavian representative put it, contained three elements of common ownership, common management and equitable distribution of the benefits in order to ensure a de facto and genuine equality of states instead of the prevailing de jure equality.[52] The G77 concentrated its efforts on throwing light on the political and economic implications of the common heritage principle, and on elaborating those rules which could be derived from it, but because of the dynamic nature of this new concept, virtually no effort was made to give a precise legal definition to it.[53]

The criticism of the socialist states and developed countries concerning the common heritage concept was rejected by the G77. The opposition of the socialist countries to the common heritage concept was criticized by some members of the G77. Mexico, for example, wondered why the socialist countries did not support the collective administration of the common heritage of mankind, and instead, preferred individual concessions for its exploitation which could result in a characteristically capitalist management.[54] As regards the contention that the common heritage concept was a neologism and lacked any legal content, the G77 while not insisting on its legal content, emphasized that new issues demanded novel treatment, and there was nothing to hinder states from giving a legal definition to this concept. Kuwait, for example, in an intervention at the first committee of the General Assembly, maintained:

> It feels that if this concept has no legal content at present, nothing need prevent us from giving it such a content. It feels this is no heresy inasmuch as the history of international law provides a number of examples bearing out our own point of view that such law is in gestation, in a constant state of evolution as new and special cases and circumstances arise in international relations for which appropriate new rules must be provided. 55

Some states in this group went further to claim that the common heritage concept, at least in the legal systems based on Roman law, had a clear legal connotation. In their belief, the reference to the deep sea-bed resources as heritage was acceptable, because those resources could be economically evaluated, and there was no difficulty in giving mankind as a whole, which included the living and future generations, the title to this heritage.[56]

There were other states outside the G77 which refused the criticism of neologism. They believed that the ultimate purpose was to endow the common heritage of mankind, which was a new concept for a new situation, with specific legal content.[57] In short, the developed countries rejected the common heritage as a concept devoid of legal content, but the G77 cherished it as a new concept which could have a precise legal definition.

The technologically advanced countries adhered to a restrictive interpretation of the common heritage principle which was based on non-appropriation of the ocean floor. In other words, common heritage from this point of view was just a new name for the old concept of <u>res communis</u>.[58] The G77, on the contrary, had an extensive interpretation of the concept, which made it possible to draw many rules from it. The technologically advanced countries could agree that the ocean floor and subsoil thereof, beyond the limits of national jurisdiction, should not be subject to national

appropriation, but they categorically refused the idea that no-one might acquire property rights over any part of that area by use, occupation or any other means.[59] Those features of the common heritage concept which were acceptable both to the developed countries and the G77, albeit with different interpretations, were: the international character of the ocean floor which precluded any national claim of sovereignty; the principle of peaceful use; observance of the benefits and interests of mankind; and the establishment of an international regime or internationally agreed arrangements.[60]

The differences in the perception of what the concept of the common heritage signified continued for many years to come. To summarize, it may be said that the common heritage concept, from the time of its presentation at the 22nd Session of the General Assembly in 1967 when the Declaration of Principles was adopted, had two clear features: firstly, it was not accepted by all the countries involved, and secondly, those who had accepted it, had diverse interpretations of this concept.

SECTION V: MORATORIUM RESOLUTION

Since the introduction of the Maltese initiative, the bulk of resolutions of the General Assembly or other United Nations organs referring to the concept of the common heritage of mankind have contributed a great deal to the elaboration of the definition of this principle,[61] but two of these resolutions, namely the

Moratorium Resolution and the Declaration of Principles, are of particular interest.

Bearing in mind that the realization of the goals of the common heritage concept and the establishment of an international regime for the management of this heritage would take some years, and believing that during those years technologically advanced countries might start the commercial exploitation of the resources of the deep sea-bed, the supporters of the concept of the common heritage of mankind from the outset considered it necessary to establish, prior to entering into force of an internationally agreed upon arrangement, a moratorium on any deep sea-bed exploitation through a General Assembly resolution.[62] A draft resolution was submitted by Kuwait and other developing countries to the First Committee of the General Assembly.[63] This was adopted as Resolution 2574 D (XXIV) in December 1969 by 62 votes in favour, 28 against and 28 abstentions. The resolution declared that, pending the establishment of an international regime for carrying out the exploitation of sea-bed resources:

> (a) States and persons, physical or juridical, are bound to refrain from all activities of exploitation of the resources of the area of the seabed and ocean floor, beyond the limits of national jurisidiction,
> (b) No claim to any part of the area or its resources shall be recognized.

Those who were against this resolution argued that, as the limits of the area were not yet decided, it was not possible to effect any moratorium.[64] Moreover, it was asserted that adoption of this resolution might lead to the extension of the limits of the continental shelf by many states under the prevention of protecting their national interests.[65] It was also maintained that such a

moratorium would discourage further gathering of knowledge and experience for the regulation of deep sea-bed activities.[66] The strong opposition of the technologically advanced countries to the Moratorium Resolution was not only because of the restrictions for an indefinite time on the exploitation of deep sea-bed resources, but also for the more accessible oil and gas reserves in the continental margin which, according to the definition of the continental shelf in the 1958 Convention,[67] could still be considered to a great extent outside the limits of national jurisdiction, and therefore a part of the common heritage of mankind. The enlargement of the area of the continental shelf was against the policy of many industrialized countries which saw a connection between the extension of one area in the sea with the extension of other maritime zones. Apart from these considerations, these countries were not prepared to accept any restrictions on their complete freedom of activities in the sea before some negotiated acceptable arrangements could be agreed upon.

For the G77, the Moratorium Resolution was a firm step toward the safeguarding of the common heritage of mankind from any encroachment. The resolution prohibited the exploitation of deep sea-bed resources, but was silent about the exploration. That reflected the misgivings of the G77 about impending exploitation of the resources, while they had, at least formally, no objection to the continuation of the exploration programmes.

SECTION VI: DECLARATION OF PRINCIPLES

Since the beginning of discussion at the Ad Hoc Committee with respect to the sea-bed issue, many delegations expressed the view that a statement of principles concerning the establishment of internationally agreed upon arrangements for the exploitation of the deep sea-bed resources for the benefit of mankind should be adopted.[68]

The principles laid down in the Antarctic Treaty of 1959[69] and the Outer Space Treaty of 1967[70] could, in the opinion of some delegations, provide some guidance for the Committee.[71] In practice, the process, which culminated in the adoption of Resolution 2749 (XXV) by the General Assembly in 1970, proved to be more complicated than envisaged.

The Antarctic and Outer Space were both, at least theoretically, considered as no man's land and were the subject of internationally agreed upon treaties, but there was a difference between them. The Antarctic Treaty had made it possible for the few states which were parties to the treaty to establish a sort of exclusive club to carry out some activities on that continent. In other words, an oligarchic pattern governed the Antarctic, and it was practically reserved for a small number of states who had proved their technological capacities and, consequently, their financial ability.[72]

The precedent of outer space and the process of negotiations at the United Nations, which led to the adoption of the Declaration of Legal Principles Governing the Activities of States in the

Exploration and Use of Outer Space in 1963 and the Outer Space Treaty in 1967, was more appropriate and of particular interest to the case of the deep sea-bed. The announcement of many states, including the two super powers, during 1963 that they would respect the principles laid down in the Declaration of Legal Principles until the Outer Space Treaty entered into force, was a recent precedent that the members of the Ad Hoc Committee hoped would be followed. There were, in fact, many dissimilarities between the two cases. The main difference was in the purpose of the use of these areas. The conquest of outer space was, and to a great extent still is, of scientific and strategic interest, but the sea-bed and its accessible huge resources could offer almost unlimited supply possibilities with direct impact on the level of development of many countries. Another difference was that, while in the case of outer space nothing new had been claimed, and both the 1963 Declaration of Legal Principles and the Outer Space Treaty of 1967 had considered outer space as res communis, and principles contained in these two documents were generally acceptable to all countries, in the case of the deep sea-bed area a new concept, i.e., the common heritage of mankind, had been introduced, which was not only to designate the legal status of the deep sea-bed area, but also to contain principles necessary for the regulation of activities on the deep sea-bed. In fact, a declaration of principles concerning the deep sea-bed area, unlike the case of outer space, could not be adopted without difficulty. All resolutions of the General Assembly regarding outer space prior to the Outer Space Treaty of 1967 were adopted unanimously,[73] because the majority of states did not have any immediate interest in outer

space which would be at stake, and they were, in fact, giving up something they did not yet have.[74] But the interest of each and every state in deep sea-bed mining was patent and divergence of opinions concerning the principles governing the use of the deep sea-bed was inevitable.

The question of the legal status of the deep sea-bed and the meaning of the concept of the common heritage of mankind was one of the areas of disagreement. For the G77, the common heritage of mankind was at the top of any statement of principles. The industrialized countries, on the other hand, limited themselves to more or less the same principles as were adopted in the case of outer space and refused to even mention the phrase "common heritage of mankind" in their working papers or proposals.[75] These countries stated that there was no need to mention the concept of common heritage of mankind in the Declaration as long as certain specific results were evident, such as the sharing in the benefits.[76]

(a) Adoption of the Declaration

Finally, on 17 December 1970, the General Assembly adopted Resolution 2749 (XXV) which was the result of compromise by both the G77 and the technologically advanced countries. The compromise was based on the understanding that the principles contained in the resolution constituted a whole, and that whole was the result of a delicate balance.[77] This resolution, which was adopted by 108 votes to none with 14 abstentions, is generally known as the Declaration of Principles.[78] Both the developing and the developed

countries voted for this resolution. The socialist states, with the exception of Yugoslavia, abstained from voting.

Resolution 2749 (XXV) comprised six preambular and fifteen operative paragraphs. A specific feature of this resolution is that both developing and developed countries voted for it while there existed considerable differences of interpretation of its component parts.

This divergence of opinions is evident in the statements made by delegations both before and after the adoption of the resolution.

(b) The Declaration and the Question of the Legal Status of the Deep Sea-Bed Area

Those paragraphs of the Declaration which have a bearing upon the legal status of the sea-bed area and its resources are the third preambular paragraph as well as paragraphs 1, 2, 3, 5, 6 and 13(a). The third preambular paragraph is an example of compromise between the developing and developed countries. According to this paragraph, it was recognized: "that the existing legal regime of the high seas does not provide substantive rules for regulating the exploration of the . . . area and the exploitation of its resources". This formulation was clearly different from the standpoint of the developing countries which insisted "that the existing legal regime for the high seas is not applicable to the sea-bed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction".[79] It was likewise different from the attitude of the industrialized countries which were in favour of

preserving the status quo and reaffirmed time and again their support for the principle of the freedoms of the high seas,[80] and its applicability to deep sea-bed mining. Although "substantive rules" in this paragraph was generally construed as referring to the "legal regime of the high seas", and obviously could mean "legal rules", some authors have challenged such an interpretation and have maintained that "substantive rules" cannot mean law in general or principles of law, and what is meant by that in this context is only a "particular regulatory regime".[81] With such an interpretation, the proponents of the freedom of the high seas try to demonstrate that the applicable law is that of the regime of the high seas, and the future regime of the deep sea-bed only regulates the activities of the states on the basis of that law, i.e., the principle of the freedom of the high seas.

The concept of the common heritage of mankind was incorporated in the first operative paragraph of the Declaration of Principles, which reads:

> The seabed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction (hereinafter referred to as the area), as well as the resources of the area, are the common heritage of mankind.

There was general agreement about this paragraph, but the definition of the common heritage of mankind was not agreed upon. For industrialized countries, the common heritage of mankind was a phrase still devoid of any legal content, and its meaning would be elaborated in the international regime to be established.[82] The G77, unlike the developed countries, considered the concept of the common heritage as the cornerstone of any international regime for the deep sea-bed. The chairman of the Sea-Bed Committee was

rightly reflecting the view of the developing countries when he said that the common heritage of mankind was equal to "the property of the entire human family", and had to be protected against any possible competitive exploitation.[83]

Provisions in other operative paragraphs of the resolution were to elucidate the definition of the common heritage concept both for the developing and developed countries.[84] Operative paragraphs 2 and 3 specifically intended to define the legal status of the deep sea-bed and its resources. Paragraph 2 stipulates:

> The area shall not be subject to appropriation by any means by states or persons, natural or juridical, and no state shall claim or exercise sovereignty or sovereign rights over any part thereof.

In this paragraph no reference is made to the resources of the area, but such a reference seems to be implied when one reads this paragraph together with paragraph 3 which reads:

> No state or person, natural or juridical, shall claim, exercise or acquire rights with respect to the area or its resources incompatible with the international regime to be established and the principles of this Declaration.

It is obvious that, when states are prohibited from claiming any rights to the resources unless in accordance with the international regime to be established, they are, in fact, forbidden to appropriate or exercise sovereignty or sovereign rights over them. Moreover, the expression "any part thereof" at the end of the operative paragraph 2 can arguably be a reference to the "resources".

These two paragraphs are intended to subject the acquisition of any rights over the deep sea-bed and its resources to the provisions of the future regime, and since the ideal of an international regime for the G77 and the industrialized countries was based on their

widely different interpretations of the common heritage concept, their perceptions of these two paragraphs were different too. The representatives of some of the technologically advanced countries, for example, in explaining their vote on the Declaration of Principles, stated that they believed the "acquisition of rights to resources by private or state mining operators on a non-exclusive basis would be compatible with the future regime".[85]

El Salvador, taking an opposite position to the developed countries, interpreted paragraph 3 by stating that "a right which is acquired over the zone and its resources is subject to its non-compatibility with the international regime to be established".[86]

Operative paragraph 5 was, from the viewpoint of the developed countries, the central paragraph of the Declaration, and all other paragraphs had to construed subject to this one.[87] It reads:

> The area shall be open to use exclusively for peaceful purposes by all states, whether coastal or land-locked, without discrimination in accordance with the international regime to be established.

The importance of this paragraph for the supporters of the principle of the freedom of the high seas was in stating that "the area should be open to use exclusively for peaceful purposes by all states". To them, it means free access to the resources without discrimination, and the future international regime would have to be established in compliance with this interpretation.[88] The G77, with reference to the third preambular paragraph of the resolution, refused the question of the operative paragraph 5 with the concept of free access to or free use of the resources. For them, it meant equal access through the international regime to be established, and this link between the paragraphs of the Declaration and their

implementation in accordance with the provisions of the future regime had to be emphasized.[89]

The sixth operative paragraph, from the point of view of the arguments for and against it, is similar to paragraph 5. It reads:

> States shall act in the area in accordance with the applicable principles and rules of international law, including the Charter of the United Nations and the Declaration of Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the U.N., adopted by the General Assembly on 24 October 1970 in the interests of maintaining international peace and security and promoting international co-operation and mutual understanding.

The G77 had made it clear that the principle of the freedom of the high seas was not to be applicable to the sea-bed, and generally speaking, the existing rules of international law, with the exception of those concerning the rights and duties of states, were insufficient to govern the sea-bed.[90] The reference to the Charter of the United Nations and the Declaration of Principles of International Law concerning Friendly Relations and Co-operation among States in operative paragraph 6 was due to that exception.

The industrialized countries disagreed with this interpretation, and insisted that the term "international law" should be read as referring to the entire body of international law, and not as referring specifically to, or excluding, any of its major branches.[91]

Paragraph 13(a) is intended to differentiate between the legal status of the sea-bed and superjacent waters. According to this paragraph nothing in the Declaration shall affect "the legal status of the waters superjacent to the area or that of the air space above those waters". This provision is similar to Article 3 of the Convention on the Continental Shelf to prohibit any claims to the

superjacent waters. From this paragraph one may deduce that the inclusion of this provision demonstrates the difference between the legal status of the sea-bed and that of the superjacent waters.[92]

In brief, with respect to the interpretation of the G77 and the industrialized countries of the different paragraphs of the Declaration of Principles, it can be concluded that: 1- for the G77, the rights to the sea-bed beyond the limits of national jurisdiction and its resources as the common heritage of mankind were vested in humanity, and those rights could not be acquired by any state unless in accordance with the international regime to be established. For the technologically advanced countries, every state or private entity was free to embark upon the exploration and exploitation of the deep sea-bed and its resources, and the right to the recovered resources accrued to the one who had worked them. In this sense, the common heritage of mankind had a meaning similar to the res communis omnium[93] and 2- for the G77, there was a legal lacuna in the sea-bed beyond the limits of the national jurisdiction, and the common heritage principle was to provide for the rules necessary for the establishment of an international regime. The industrialized countries asserted that the regime of the high seas was applicable to the sea-bed and there was no difference between the legal status of the sea-bed and the superjacent waters.

The purpose of an international regime for the sea-bed, from the viewpoint of these countries, was "to regulate" the activities of states and private entities. Declaration of Principles was considered by the majority of delegations to contain general guidelines for the establishment of an international regime. It was not intended to be a provisional regime.[94] Neither was it

meant to interpret existing international law. Although not specifically mentioned, its real function was to develop the law and to fill in the lacuna. For that purpose, its provisions were too general and according to some authors, even intentionally ambiguous.[95] The nature of the principles laid down in the declaration was not clearly indicated, but the majority of them, and in particular the common heritage principle were lex ferenda.[96] Norway considered the principles laid down in the declaration as "indications . . . of the rules and provisions of international law, present and future, applicable to the domain of the ocean floor and its subsoil".[97]

As mentioned before, 14 socialist countries abstained from voting for the Resolution 2749 (XXV). Ogley seeks the reason in the opinion of the representatives of states of socialist states who believe that:

> . . . the driving force behind . . . [deep exploitation] would be monopoly capitalism, searching for new profits and new supplies of raw materials. The governments of capitalist States would be mere agents of the capitalists themselves; for them, the notion of the common heritage of mankind would be a mere blind behind which the giant consortia would be given the green light to make the sea-bed theirs. 98

Similarly, in 1970, the Soviet representative at the first Committee of the General Assembly argued that:

> As a Socialist State, the Soviet Union could not engage in joint ownership under conditions where the property would be exploited in accordance with the principles fundamentally alien to socialism principles of capitalist management. 99

Moreover, socialist countries believed in the necessity of determining the precise limits of the Area prior to the adoption of any declaration of principles, and had reservations concerning the operative paragraphs 8, 10, 12 and 13.[100]

(c) The Binding Effect of the Declaration

One of the controversial aspects of discussion about the Declaration of Principles has been its binding effect. As far as the legal status of the deep sea-bed and its resources as the common heritage of mankind is concerned, this question became specifically topical in the years following the adoption of Resolution 2749 (XXV), and particularly in the late 1970s when some of the industrialized countries contemplated enacting national legislation for the exploration and exploitation of the deep sea-bed.

The Charter of the United Nations has not conferred upon the General Assembly any power to make law for the member states.[101] The prevailing view is that the resolutions of the General Assembly are not normative international instruments.[102] Nevertheless, the Assembly can make binding decisions concerning the internal working of the United Nations organizations. These decisions are not addressed to the member states but to the organs, representatives or employees of the United Nations. The questions related to the financial arrangements of the organization (Article 17 of the Charter), admission of new members (Article 4), suspension of the rights and privileges of members (Article 5) and the expulsion of members (Article 6), fall within the category of these decisions.

The General Assembly, according to Articles 10 to 14 of the Charter, can adopt resolutions containing recommendations to member states, i.e., these recommendations are not legally binding upon states, but rather are to be a formal invitation to states to take action, which is open for them to accept or reject.[103]

The General Assembly has, according to Article 13(1)(a), the duty to initiate studies and make recommendations for the purpose of promoting international cooperation in the political field and encouraging the progressive development of international law and its codification. The General Assembly has adopted, in accordance with this article, many resolutions which contain declarations of rights or principles. In most cases, these resolutions have gone far beyond making mere recommendations, such as the Universal Declaration of Human Rights (Res. 217 A (III)), Declaration of Independence to Colonial Countries and Peoples (1514 (XV)), and Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil thereof beyond the Limits of National Jurisdiction (2749 (XXV)).

In order to decide the legal effect of the General Assembly resolutions, several factors have to be taken into account. The language of the resolution is one of the important factors. These resolutions should contain provisions acceptable to a two-thirds majority of member states. If such a majority involves the Big Powers, the resolution can have a treaty-like language, containing the rights and duties of states.[104] There are many instances that, because of the post-colonial period's demand from the Third World for the revision of the structure of international order, the call for enough affirmative votes has resulted in a resolution with broad and sometimes vague language.[105] In cases like this, every state may interpret the resolution from a different ideological angle, reaching different conclusions.

Another factor is the voting result of the resolution. If all member states, or at least the great majority of them including

those states which are especially concerned with the subject matter of the resolution, vote for it, there is a possibility that the content of the resolution will be implemented as if it were a legally binding instrument. Resolution 1962 (XVIII), concerning the activities in outer space, is an example. Resolutions which do not get a unanimous or near unanimous affirmative vote, are merely recommendations to those states to which they are addressed. Some writers are of the opinion that those who vote for a resolution, and perhaps those who do not dissent, may be bound by them,[106] but there are also many strong arguments against this view.[107] Even if they are not legally binding, the resolutions which have gained the affirmative vote of a considerable majority of states cannot be ignored. The voting and statements in explanation of the text play a significant role in the determination of the extent of its influence on state practice.

The ICJ has in many cases expressed its views on the legal effect of the General Assembly resolutions in general.[108] In view of the positivist approach that the Court has almost always preferred to adopt in its judgements and advisory opinions, the resolutions of the General Assembly would not have been regarded as any thing more than recommendations as provided for in the Charter of the United Nations. The Court, for instance, in the South-West Africa Cases, Second Phase, said:

> The persuasive force of Assembly resolutions can indeed be very considerable but this is a different thing. It operates on the political and not legal level; it does not make these resolutions binding in law. 109

Nevertheless, there are cases where the Court has gone further, and recognized more effect for these resolutions than their merely being

recommendatory. One example is the Court's Advisory Opinion about South West Africa in 1971, when it announced:

> . . . it would not be correct to assume that, because the General Assembly is in principle vested with recommendatory powers, it is debarred from adopting, in specific cases within the framework of its competence, resolutions which make determinations or have operative design. 110

It should be noted that all the announcements of the Court in regard to the legal effect of the General Assembly resolutions have been in cases with a political nature, and resolutions adopted in accordance with Article 13(1)(a) of the Charter have been specifically treated by the Court. In short, it can be said that the General Assembly resolutions, including those which contain important and lasting principles for the encouragement of the progressive development of international law according to Article 13(1)(a) of the Charter, are not per se international legal instruments in the strict sense of the term. In the event they are formulated with a precise language and adopted unanimously or by an overwhelming majority, one may expect that members of the international community will abide by them,[111] because they can be regarded as the expression of world opinion on a particular issue.

The question of the binding force of a declaration of principles about the deep sea-bed and its resources was raised one year before the adoption of Resolution 2749 (XXV). Some delegations at the Legal Sub-Committee of the Sea-Bed Committee in 1969 expressed the view that the declaration which would be adopted according to Article 13 (1)(a) of the Charter would possess binding force.[112] This view was understandably opposed by several delegations.[113] It should be mentioned that neither of the principal draftsmen of the declaration, namely, Amerasinghe, the

chairman of the Sea-Bed Committee, nor Galindo-Pohl, the chairman of the Legal Sub-Committee, claimed at the time of its adoption that the declaration had a binding force similar to that of an internationally negotiated treaty.[114] The moral force of it was, however, strongly emphasized, and Galindo-Pohl even stressed that "those who support it must obviously be deemed to be prepared to abide by its content in good faith . . .".[115] It was clear from the statements of many delegations that a sort of quasi-legal effect was intended to be attributed to the declaration. For example, Kuwait considered that the principles contained in the Declaration were basic and fundamental ones "from which no departure would be allowed and which should faithfully be reflected in the basic international treaty which will be the constituent instrument of the [sea-bed] regime".[116]

In short, it can be concluded that generally the General Assembly resolutions do not constitute per se a binding legal effect, but their legal effect depends on several factors such as the number of affirmative votes they get; the precision of the language used; the diversity of interpretation given to the principles contained in them by those who vote for them; the degree of compromise to reach a consensus, etc. Resolution 2749 (XXV), containing the Declaration of Principles, was generally considered, at the time of its adoption, as intending to establish the legal status of the deep sea-bed and to provide a framework on the basis of which the future international regime for the exploration and exploitation of the deep sea-bed and its resources was to be established.

In fact, Resolution 2749 (XXV), although adopted by the affirmative votes of the great majority of states, including industrialized countries, did not acquire the status of a legally binding instrument, nor was the concept of the common heritage of mankind, at the time of the adoption of Resolution 2749 (XXV), either because of the resolution itself or independent of that, considered as a legal principle. These negative statements are not to undermine the significance of the Declaration of Principles and obligations of states, or at least those which have voted for it, to observe it in good faith.[117] However, it was the frequent practice of states, pursuant to the adoption of the Declaration of Principles, in the form of numerous statements made at the UNCLOS III, the General Assembly and other United Nations forums such as UNCTAD or the adoption of resolutions and declarations as well as the opinions of the prominent jurists, that contributed to the explanation of the legal content of the common heritage of mankind concept and its consolidation as a general principle.

(d) Developments Within Other United Nations Fora

As the concept of the common heritage, since the time of its inception, has been generally identified with the aspirations of the developing countries, and the insertion of this concept in Resolution 2740 (XXV) was in fact against the will of the industrialized countries, it is not surprising to notice that the greater part of the efforts for the consolidation of this concept

into a defined legal principle was initiated by developing countries both in and outside the UN fora.

In 1972, the UNCTAD adopted two resolutions concerning the commercial exploitation of the resources of the deep sea-bed area. In Resolution 51 (III) of 1 May 1972, reference was made to the General Assembly Resolution 2750 (XXV) from 1970, according to which the UNCTAD was indirectly requested to make recommendations for containing any adverse economic effects which deep sea mining could have on the prices of the minerals exported by the developing countries. The UNCTAD, by Resolution 51 (III), decided to keep this question constantly under review, and invited the Secretary-General of the UNCTAD to propose specific and detailed measures in that connection.[118] The second resolution, i.e. Resolution 52 (III), reiterated the standing of the G77 by interpreting the Declaration of Principles in connection with the Moratorium Resolution of 1969, and concluding that "prior to the establishment of the international regime no legal claims on any part of the area or its resources, based on past, present or future activities will be recognized".[119]

In the first substantive session of the UNCLOS III in Caracas in 1974, most of the delegations referred to the common heritage concept and its implications. Tanzania, for instance, asserted that the common heritage is jointly owned by all mankind, and mankind should have control over means of production in order to receive the wealth produced from resources.[120] It was argued by the G77 that all the activities dating to the exploration of the Area and exploitation of its resources had to be carried out solely and directly by the International Sea-Bed Authority.[121] Peru

considered the joint management of the deep sea resources as "essential and perhaps the revolutionary aspect of the common heritage".[122] The technologically advanced countries made no effort to elaborate on the contents of the common heritage concept, but their comments on the structure of the international machinery for the exploitation of the deep sea resources or separation of the question of jurisdiction over the resources and benefits derived from them,[123] made it clear that their interpretation of the common heritage principle was still essentially different from that of the G77. This situation prevailed in the years which followed. The United Kingdom, for example, in the 5th session of the UNCLOS III, contended that the common heritage concept was not "capable of precise legal definition".[124] Tanzania, on the contrary, asserted that this concept was clearly defined in the Declaration of Principles, particularly paragraphs 1, 2, 3, 4 and 7.[125]

On 12 December 1974, the General Assembly adopted Resolution 3281 (XXIX) containing the Charter of Economic Rights and Duties of States. The adoption of this resolution was in line with the overall efforts of the G77 to establish a New International Economic Order, and since deep sea mining was always considered by these countries as an inalienable part of the said economic order, Article 29 of Chapter III of this Charter was devoted to the question of the international sea-bed area and the exploitation of its resources. Article 29 reads:

> The sea-bed and ocean floor and the sub-soil thereof, beyond the limits of national jurisdiction, as well as the resources of the area, are the common heritage of mankind. On the basis of the principles adopted by the General Assembly in the resolution 2749 (XXV) of 17 December 1970, all States shall ensure that the exploration of the area and exploitation of its resources are carried out exclusively for peaceful purposes and

> that the benefits derived therefrom are shared equitably by all States, taking into account the particular interests and needs of developing countries; an international regime applying to the area and its resources and including appropriate international machinery to give effect to its provisions shall be established by an international treaty of a universal character, generally agreed upon. 126

The principles of the peaceful use of the deep sea-bed, the equitable sharing of benefits by all states, with special regard to the interests and needs of the developing countries, and the necessity of establishing an international machinery through an international treaty, were reaffirmed in this article as components of the common heritage of mankind. The adoption of this resolution with the affirmative votes of the socialist states was the decisive step towards the transformation of the common heritage of mankind into a principle of customary international law. The explicit formulation of the principles derived from the common heritage of mankind, and the adoption of Article 29 of the Charter by 113 votes to none, with 17 abstentions, affirmed the fact that the common heritage principle had become a part of customary international law.

The Group of 77 essentially negotiated on the regime of the deep sea-bed as a part of a much broader frame of establishing the New International Economic Order. That was why after the adoption of the Charter of Economic Rights and Duties of States, while negotiations for the legal regime of the deep sea-bed continued in the UNCLOS III, the other aspect of the question was followed in the work of UNCTAD.

In September 1978, when the possibility of the enactment of national legislation for the unilateral exploitation of the deep sea-bed had generated anxiety among many developing states, the UNCTAD adopted a resolution, submitted by Colombia, under the title

of "The Exploitation of the Sea-Bed Beyond the Limits of National Jurisdiction".[127] Under this resolution, it was asserted that the principle of the common heritage of mankind had already acquired the status of a customary rule of international law.[128] Almost simultaneously with the adoption of the UNCTAD resolution, on 15 September 1978, the chairman of the G77 at the 7th session of the UNCLOS III, Nandan, with reference to the Declaration of Principles and the common heritage of mankind, maintained:

> One could not therefore dismiss as just one more United Nations resolution a text which established a principle of international law precisely in the meaning of Article 38 of the Statute of the I.C.J. and which embodied the opinion of the international community. The Declaration was thus the embodiment of current international law with regard to the regime of the sea-bed. 129

Here, too, it is clear that the G77 considered the common heritage principle as a part of customary international law. Nandan, moreover, emphasized two components of the common heritage, namely, the international character of its exploitation and non-appropriation by individual states.[130]

Further to this statement the Group of 77 established a group of 12 legal experts five of whom were members of the ILC. The task of this group was to express opinion on the question of unilateral legislation and the binding force of the principles contained in the Declaration of Principles. The group, in a letter of 23 April 1979 addressed to the Chairman of the Group of 77, announced, inter alia, that "whereas the legal status of the superjacent waters is that of res communis, the legal status of the sea-bed, subsoil and resources thereof is that of an indivisible and inalienable common heritage of mankind.[131] The non-appropriation and international management of the common heritage were thus reiterated.

In response to these views, the United States delegate, in his intervention at the plenary of the UNCLOS III 7th session said:

> From the start of negotiations, his delegation has consistently maintained that the right to explore and exploit the sea-bed beyond the limits of national jurisdiction derived from the freedom of the high seas, which was enjoyed by all nations. 132

He further referred to the Declaration of Principles and said: "while it proclaimed that the resources of the sea-bed were the 'common heritage of mankind', [it] did not purport to prohibit access to them".[133] It is useful to mention here that the U.S., in fact, preferred the conclusion of a broadly acceptable convention on the law of the sea, and this was emphasized time and again.[134]

Parallel to the work of the Sea-Bed Committee, and later the UNCLOS III, in another United Nations forum, namely the Committee on the Peaceful Uses of Outer Space (Outer Space Committee) comprehensive negotiations concerning the orderly use of the moon and other celestial bodies were going on. One of the results of these negotiations was the conclusion of the 1979 Agreement Governing the Activities on the Moon and Other Celestial Bodies (Moon Treaty).[135] In these negotiations, too, the developing and the developed countries with advanced technology had opposite positions, but since the exploitation of moon resources was, at least for the future, a theoretical concern, the developing countries did not show the same decisiveness as in the case of the deep sea-bed. Both the U.S. and the Soviet Union supported the adoption of the resolution which included the Agreement.[136] The concept of the common heritage of mankind found its way into this agreement as a principle.[137]

Article 11(1) of the Agreement reads:

> The moon and its natural resources are the common heritage of mankind, which finds its expression in the provisions of this agreement, in particular paragraph 5 of this article.

This formulation content intends to make a distinction between the common heritage principle of the Moon Treaty and the same principle in the United Nations Convention on the Law of the Sea. States parties to the Moon Treaty are, according to paragraph 5 of Article 11, to establish, when the exploitation of the natural resources of the moon is about to become feasible, an international regime, including appropriate procedures, to govern such exploitation. In contrast to the case of the deep sea-bed, here it is only states parties which may establish the international regime, and the main purposes of the regime are, according to paragraph 7 of Article 11:

> (a) the orderly and safe development of the natural resources of the moon; (b) the national management of those resources; (c) the expansion of opportunities in the use of these resources; (d) an equitable sharing by all states parties in the benefits derived from these resources whereby the interests and needs of the developing countries, as well as the efforts of those countries which have contributed either directly or indirectly to the exploration of the moon, shall be given special consideration.

Unlike the deep sea-bed legal regime, in the Moon Treaty there is no mention of international organization for the direct exploitation of the resources, and states parties themselves are entitled, according to paragraph 4 of Article 11, to embark on "the exploration and use of the moon without discrimination of any kind, on the basis of equality and in accordance with international law and provisions of this agreement". The future international regime is to establish procedures for exploitation. The principle of non-appropriation of common heritage by a state is repeated in paragraph 3 of the said Article. It is clear from different

articles of this Agreement and their provisions that the draftsmen have put a new cover of "common heritage of mankind" over the old concept of res communis.[138] The only difference is the qualified reference to the benefits of the developing states parties.

The adoption of the Moon Treaty and its subsequent entering into force is evidence to the fact that the industrialized countries have at least accepted the common heritage of mankind as a principle of international law, and have also agreed that whenever the exploitation of the common heritage of mankind occurs, the interests and needs of the developing countries should be taken into consideration at the time of distribution of benefits.[139]

(e) Developments Outside the United Nations

Developments of the legal content of the common heritage principle outside the United Nations are the result of many statements issued by individuals, non-governmental groups, state officials, conferences and also the references some industrialized countries have made to this principle in their national legislation for deep sea mining.

In 1971, the G77 held its Second Ministerial meeting in Lima, Peru, and adopted a Resolution on Marine Resources. In paragraph 3 of this resolution it is provided that the common heritage of mankind:

> should be managed by a regime which will enable the peoples of all states to enjoy the substantive benefits that may be derived therefrom, with due regard for the special interests and needs of both coastal and land-locked developing countries. 140

The Specialized Conference of the Caribbean Countries on the Problems of the Sea, which was held on 7 June 1972, issued a declaration in a part of which reference was made to the Declaration of Principles and the common heritage of mankind.[141]

In September 1972, the representative of the United States to the Sea-Bed Committee, in a Hearing before the House of Representatives Committee on Merchant Marine and Fisheries, stated that in response to the interpretation of the developing countries of the common heritage of mankind, the United States as well as some other industrialized countries had continued repeating that common heritage did not mean common property.[142] This position of the United States did not change in the following years.

The Inter-American Juridical Committee of the Organization of American States, in a resolution adopted on 9 February 1973, without trying to contribute to the elucidation of the legal content of the common heritage concept, declared in operative paragraph 13 of the resolution that:

> The seabeds and ocean floor located beyond the zone of 200 nautical miles and beyond the continental shelf, as well as the resources that may be extracted from them, are the common heritage of mankind. 143

The Organization of African Unity, in a resolution adopted in May 1973, reaffirmed their belief in the Declaration of Principles and the concept of the common heritage of mankind, which in their belief "should in no way be limited in its scope by restrictive interpretations".[144]

The Commission to Study the Organization of Peace, a non-governmental organization, in its report of June 1973, referred to

the common heritage of mankind as a concept to be applied not only to the sea-bed but also to the sea and all its resources.[145]

In September 1973, the Fourth Summit Conference of the Non-Aligned countries was held. In a resolution adopted by this Conference, it was reaffirmed that the zone and the resources of the sea-bed and the subsoil thereof beyond the limits of national jurisdiction were the common heritage of mankind, and there was a need for a powerful international authority to either directly or indirectly undertake all activities related to the exploration of the zone and exploitation of its resources.[146]

Differences of opinion between developing and developed states concerning the status and the legal content of the principle of the common heritage of mankind continued during the 1970s, but the main forum for the conflict of opinions was the UNCLOS III. Towards the end of the 1970s, when it became evident that a few industrialized states had the intention of enacting national legislation for the exploration of the deep sea resources, the significance of the clarification of an agreed definition for the common heritage principle became more patent.

For the United States, as the leading developed country with respect to deep sea technology, the common heritage of mankind was not any longer an abstract concept, but rather was a general principle which found its specific meaning in any particular situation.[147] On the other hand, the developing countries made it even more clear that common heritage was equal to common property, and any exploitation outwith an internationally agreed upon convention was illegal.[148]

The common heritage principle has had its influences on some of the national laws for deep sea mining enacted by a few industrialized states. The first of these statutes was the Deep Sea-bed Hard Mineral Resources Act of the United States from 1980.[149] In this act it is stated that the United States voted for Resolution 2749 (XXV) declaring the principle of the common heritage of mankind "with the expectation that this principle would be legally defined under the terms of a comprehensive international Law of the Sea Treaty . . ."[150] It is therefore implied that the common heritage principle is still devoid of any legal content. Nevertheless, the Act sets up a "Deep Seabed Revenue Sharing Trust Fund" which is endowed by part of a tax received from the deep sea mining activities".[151] This Fund will be paid, as benefit share to mankind, to the International Sea-Bed Authority within ten years of the enactment of the Act if the United States becomes then party to the Convention.[152]

The Federal Republic of Germany was the second country to enact a law concerning deep sea mining. In the Act of Interim Regulation of Deep Sea Mining,[153] there is no mention of the common heritage of mankind, but while emphasizing that the exploration of the deep sea, at least provisionally, would be carried out on the basis of the freedom of the high seas, it is admitted that the benefits of all nations would be taken into consideration.[154] Moreover, a trust fund is envisaged to be established. This fund, which is endowed by a part of 0.75% taxes imposed on miners' activities, will be transferred to the Convention. Otherwise, the fund will be used for foreign aid purposes.[155]

In the Deep Sea Mining Act of the United Kingdom of 1981, there is no mention of the common heritage principle, neither is there any disclaimer of sovereignty over the sea-bed or its resources. In this Act, too, the exploration of the deep sea resources is considered as a freedom of the high seas.[156] As in the case of the U.S. and the Federal Republic of Germany, the United Kingdom Act established a "Deep Sea Mining Fund" endowed by a part of taxes levied on the recovery of the resources.[157] The Fund will be transferred to the Authority when and if the United Kingdom accedes to the Convention.[158]

The Soviet law on provisional measures for the exploration and exploitation of mineral resources,[159] adopted in 1982, was also silent about the common heritage principle. It was, nevertheless, maintained that the issuing of exploitation permits does not amount to claim of sovereignty, sovereign or exclusive rights, jurisdiction or right of ownership with respect to any sea-bed area or the resources thereof.[160] As regards the benefit of mankind, the law provides for the establishment of a special fund to be endowed by a "part of the assets received from the exploitation . . . of the mineral resources of the sea-bed area".[161]

The deep sea mining laws of France[162] and Japan[163] regulated the activities of their nationals concerning the exploitation of the mineral resources without even paying lip service to the concept of the common heritage of mankind[164] and its benefits. In these two laws, no mention of any fund or similar arrangement for a possible future benefit sharing with the international community is made.

Italy's law on the Exploration and Exploitation of the Mineral Resources of the Deep Seabed from 1985[165] follows the

pattern of the German law and, in Article 15, provides for the payment of 3.75% of the median market value of the minerals recovered by the holder of an exploitation permit "for the purpose of the Italian Aid to the Developing Countries".[166]

The common aspects of these legislative acts are that they are all interim in character and, at least in some of them, provisions with respect to the benefit of mankind and revenue sharing are inserted; they are provisional, because the industrialized countries, while opposing any accommodation of heritage with property, time and again insisted that they were committed to the successful completion of the UNCLOS III and the emergence of a generally agreed upon comprehensive convention on the law of the sea. Nevertheless, for these countries, the common heritage of mankind has remained a principle with general character, and no independent legal meaning, a concept whose content should be elaborated in each individual case and through an internationally agreed upon treaty.It may be appropriate here to dwell upon the question of the common heritage of mankind as a rule of jus cogens before we try to draw any conclusions from what has been said about the development of this principle. Although several states, already in the early stages of the work of the Conference or even earlier, had referred to the common heritage of mankind as a jus cogens,[167] the frequency of state practice during the later stages of the Conference and imminent adoption of the national legislation for deep sea mining by some states resulted in the introduction of a provision in Article 311(6) of the Convention prohibiting amendments to the common heritage principle and derogations therefrom. The insertion of this provision in the Convention was initiated by Chile

and supported by the majority of the participating states at the UNCLOS III.[168] The said paragraph reads as follows:

> States parties agree that there shall be no amendments to the basic principle relating to the common heritage of mankind set forth in Article 136 and that they shall not be party to any agreement in derogation thereof.

Efforts to declare the common heritage of mankind as a jus cogens are due to the fact that this principle is considered as "accepted and recognized by the international community of states as a whole", and thereby has passed one of the tests for the transformation of a rule of customary law into a jus cogens.[169] Although the objection of the industrialized countries to the common heritage of mankind was to its lack of clarity, abstraction and differences of interpretation, and not to the existence of the principle as a general concept, mention should be made of the remarks of Judge Lachs when he said the words "as a whole" in Article 53 of the Vienna Convention on the law of treaties "indicate that acceptance is not required by each and every member of the international community".[170] The acceptance of the common heritage principle by the international community goes back to 1970 when the Declaration of Principles was adopted and 1974 when even the socialist countries accepted it by voting for the Charter of Economic Rights and Duties of States. Both consistent state practice and the independent acts of the United Nations' organs since then have apparently contributed to the creation of an erga omnes character for that principle[171] and the acceptance of the formulation of Article 311(6) of the Convention.

In brief, it can be said that the adoption of Resolution 2749 (XXV) containing the common heritage principle by the affirmative

votes of both developing and developed states without any dissent, and the consequent practice, seem to have evolved this concept into a general principle of international law; this against the fact that there has always been a difference of opinion as to the precise legal connotation of this principle. Those who try to reject this principle as a rule of customary law or even more as a general principle of international law often invoke the argument that, because of the constant objection of the industrialized countries to the definition of the developing countries of the common heritage principle, one of the main elements of custom, i.e., opinio juris is not established. It may be pointed out that the common heritage of mankind, notwithstanding different interpretations and quite independent of them, has been in fact accepted as providing general, if not specific, legal obligation with respect to the utilization of areas beyond the limits of national jurisdiction.[172] The repeated undertakings of the industrialized countries to conform their activities with the decision of the UNCLOS III, their insistence on the interim character of the national legislation and inclusion of provisions for revenue sharing in those laws, all point to the fact that the common heritage of mankind has already influenced the practice of these states as a principle of customary international law.

SECTION VII: THE LEGAL STATUS OF THE DEEP SEA-BED ACCORDING TO THE CONVENTION

According to the 6th preambular paragraph, Articles 1(1)(1), 133 and 136 of the Convention, the sea-bed beyond the limits of the national jurisdiction and the subsoil thereof, together called the Area,[173] and their resources, i.e., all solid, liquid, or gaseous mineral resources in situ in the Area at or beneath the sea-bed are the common heritage of mankind.[174] No matter how we try to define the word heritage, either as materialization of the word interest[175] or as property, it is obvious that Article 136 of the Convention, which reads: "the Area and its resources are the common heritage of mankind", is a clear legal statement meaning that mankind is the owner of the Area and its resources.

The question now arises as to what signifies mankind. Mankind is the legal expression of a nation or people. The idea of mankind may have seemed (and to some may still seem) to be a utopian concept. General references to mankind may be found in numerous international instruments. In fact the term "mankind" did not preoccupy traditional international law for the simple reason that it was used in humanitarian law with a broad meaning, e.g., it is used in the first preambular paragraph of the UN Charter.[176] Several other treaties and resolutions of international organizations have referred to the interests and rights of mankind in matters such as the protection of human rights, the punishment of international crimes and the establishment of special juridical regimes over space and resources, including outer space, the moon

and other celestial bodies. Activities carried out in outer space have been declared to constitute the "province of all mankind".[177] Mankind even has "envoys" in the persons of the astronauts sent into outer space.[178]

Before the Outer Space Treaty, mankind had never been recognized as the holder of specific economic rights and had not been provided with the institutional means to implement these rights. Moreover, the Antarctic Treaty signed in 1959 describes mankind and the Moon Treaty which entered into force in 1984 also makes reference to mankind.[179]

The term "mankind" has an important connection with the new 1982 Convention on the International Law of the Sea. According to Article 137(2): "All rights in the resources of the Area are vested in mankind as a whole, on whose behalf the Authority shall act". It is clear from this article that mankind as such should be represented by an international organization in which all states parties to it are members. Member states, according to Article 157(1) of the Convention, do organize and control activities in the Area, but they do that only in accordance with the provisions of Part XI of the Convention, having in mind the benefit of mankind as a whole, and that national interests are to be restrained.[180]

Does mankind thus become a subject of international law? It can be argued that, by endowing mankind with rights over the Area and its resources, the 1982 Convention has treated mankind as a subject of international law.[181] Generally speaking, there seems to be no fundamental reason for denying, at the international level, what is an accepted fact of domestic law, namely, the juridical personification of human collectivities. Whilst the classification

of "mankind" as an international legal person, and hence a subject of international law, would no doubt be controversial in some circles, it is not necessary for present purposes to engage in a full analysis of this issue in the context of the present study. This flows from the fact that the Authority is, as we have seen, specifically charged, in Article 137(2), with the task of acting on behalf of mankind in respect of all rights in the resources of the Area. There can be no doubt, even in orthodox legal circles, that it is a bearer of rights and duties under international law. It is, for example, provided with such rights and means to prohibit an individual state, a collectivity of states[182] or other entities from using the resources of the Area freely without its advance consent. According to the Convention, the Authority is the body that represents mankind in the deep sea-bed area. The role thus given to the Authority in safeguarding the interests of mankind as a whole was a practical recognition of the fact this could only be effectively achieved by an identifiable entity possessing real legal capacities.

By its nature, mankind is not able to exercise its rights directly and therefore has to resort to representatives acting on its behalf. Mankind is a collective of individuals, and at the international level individuals are generally represented by states. Therefore, states are the only entities that can achieve, by acting jointly with the Authority, the maximum degree of representation of mankind. The effectiveness of the Authority will depend on the broadest participation of states and other entities which form part of the international community. Only participation by all states, or at least by the majority of them, would truly represent mankind.

For this reason, the Authority has been conceived as an intergovernmental organization with a universal vocation, open to participation by all, not only by states but also by entities other than states that represent peoples.

Different provisions of Part XI of the Convention affirm the fact that the term "mankind" not only includes states but also all unorganized societies and "people who have not attained full independence or other self-governing status".[183] Moreover, the concept of mankind should be understood as including both present and future generations of peoples inhabiting the earth, from which it should be concluded that the common heritage of mankind has to be protected in such a manner as to ensure its continued enjoyment by future generations.[184]

The use of the term "heritage", together with "mankind" in the phrase "common heritage of mankind" also indicates the fact that the interests of the peoples to come have to be respected. Both the concept of mankind as a whole and the notion of collective ownership which is implied by the "common heritage" lead to the conclusion that:

> No state shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources nor shall any state or natural or juridical person appropriate any part thereof. No such claim or exercise of sovereignty or sovereign rights nor such appropriation shall be recognized. 185

In fact, these provisions are not new. They were more elaborately embodied in the second operative paragraph of the Declaration of Principles. Since 1975, when the first negotiating text of the Convention was introduced, the content of Article 137(1) appeared in all negotiating text. On this point agreement was

reached from the start between the developed and developing countries. The very reason why the developed countries approved this formulation is the fact that they believed such a provision could not prevent states or private persons from the exploitation of the resources. With regard to Articles 136 and 137 of the Convention concerning the legal status of the deep sea-bed, it can be assumed that the approach of the developing countries has prevailed over the views of the developed states, but it should also be borne in mind that, although there ought to be a natural relation between the status of the deep sea-bed and the system of exploitation of its resources, for industrialized countries the acceptability of the latter was prior to any formulation of the former.

SECTION VIII: EVALUATION

To recall earlier points about the development of the common heritage principle, it can be said that due to the evolution in oceanic technologies, new need emerged and "common heritage of mankind" was born to meet those requirements.

This principle contains elements which were missing in the classic doctrine of res communis. It implied an equitable sharing of the benefits derived from deep sea mining and an international management of the resources. As many other new concepts, the common heritage of mankind was from the outset, considered as being vague, imprecise, incapable of being legally defined, etc., and other combinations such as "common interest" or "common good" were

suggested which were by no means more clear or precise. While for the developed countries, it was a concept without any legal content, the developing countries regarded it as a new concept which should be given legal content. Already in 1974, the practice of states in the form of different statements and the adoption of resolutions at the United Nations or elsewhere not only had thrown light on the implications of this new concept, but also transformed it into a customary norm of international law. Adoption of the Moratorium Resolution by the General Assembly in 1969 was evidence to the fact that the majority of states believed that the common heritage implied joint management and equitable participation of all states in its administration.

The developed states did not share this interpretation. For them, "common heritage" meaning "collective ownership of a property" was both unrealistic and unacceptable. What they could accept as a definition of common heritage was rather "common access". Therefore, when the Declaration of Principles was adopted in 1970, there were different interpretations of paragraphs 2 and 3 of the Declaration concerning the legal status of the sea-bed. For the developing countries, all rights to the common heritage were vested in humanity as a whole, and only the Authority as agent of mankind was entitled to use it. For the developed countries, every natural or juridical person was free to exploit the deep sea mineral resources, and the one who worked them acquired title to them. The adoption of the Declaration of Principles by 108 votes to none, the adoption of Article 29 of the Charter of Economic Rights and Duties of States in 1974 by 113 votes to none, the recognition of the common heritage in the Moon Treaty of 1979 as a "principle", the

insertion of provisions regarding the benefits of mankind in several of the national laws for the exploitation of deep sea-bed resources as well as numerous statements by representatives of states, all influenced the fact that the common heritage of mankind, regardless of what specific implications can be derived from it, is now a general principle of international law.

The Convention defines the legal status of the deep sea-bed on the basis of the common heritage principle. From the provision of Article 137 it is clear that the Convention, at least in the case of deep sea legal status, has adopted the interpretation of the developing countries from the common heritage principle. The consideration of the interests of mankind as a whole and the notion of "collective ownership" as claimed by the developing countries have resulted in providing in Article 137(1) that "No state shall claim or exercise sovereignty" over the common heritage. The developed states could easily accept this because they believed that acquiring ownership rights over extracted minerals did not require any sovereignty over the resources in situ. To negate this assumption, Article 137(3) provided that no right to the extracted minerals could be acquired except in accordance with the Convention.

Footnotes - Chapter Four

1. UN Doc. A/6695 (1967). See also Chapter One, note 27, and the accompanying text.

2. UN Doc. A/6695, pp.2-3.

3. League of Nations Doc. C.228.M.115.1930.V, p.17, Part III, 2 May 1930, in League of Nations Conference for the Codification of International Law, edited by S. Roseane, Vol. 3, pp.841 and 871. New York: Dobbs Ferry, 1975. Although this part deals with the question of the protection of fisheries, the reference is generally to the riches of the sea which constitute the common property.

4. See, e.g., YBILC (1953), Vol. 1, p.73, para. 73 and p.84, para. 75.

5. The ILA, in its Helsinki session of 1966, took this position. For discussion about the general attitude towards deep sea mining before Malta's proposal, see S. Oda, The Law of the Sea in Our Time, Vol. 1, pp.3-12. Leyden: Sijthoff, 1977.

6. L.A. Alexander (ed.), The Law of the Sea, p.186. Ohio: The Ohio State University Press, 1967.

7. Quoted in UN Doc. A/C.1/PV.1524, para. 30.

8. Quoted in UN Doc. A/C.1/PV.1515, p.14, para. 103.

9. G. Weisseberg, "International law meets the short-term national interest . . . etc., 18, ICLQ (January 1969), p.42.

10. It was the accusation of a U.S. Congressman in 1967. See UN Doc. A/C.1/PV.1515, p.1. The representative of Sri Lanka in defence of Malta said: "It is somehow uncharitable to impute motives to the Maltese Government and to state that it is the instrument of some other Power. If, in fact, the Maltese proposal has been made at the instance of the British Government, we should congratulate the British Government on providing the inspiration for something so grand. . . . I hope that the suspicion that the Maltese Government has acted on external promoting will not prove prejudicial to the consideration of the proposal by those big powers whose co-operation in the matter is indispensable". See UN Doc. A/C.1/PV.1526, para. 120.

11. G. Weisseberg, op. cit., p.53.

12. Nordquist, in Chapter 1, op. cit., Ch. 1, p.161.

13. For more information see Chapter Five, Section II (a).

14. UN Doc. A/C.1/PV.1594, paras. 76–79 (Ecuador).

15. The third preambular paragraph of the Declaration of Principles governing Seabed . . . (1970) recognized a legal lacuna in the existing legal principles such as the freedom of the high seas. The Declaration stated that the freedom of the high seas did not provide substantive rules for regulating the exploration of the deep sea-bed and exploitation of its mineral resources. For the states which advanced the "legal vacuum" theory and supported the common heritage as a new principle, see, e.g., note 54 and the accompanying text.

16. UN Doc. A/AC.135/1, p.29.

17. A. Pardo, "Whose is the Bed of the Sea?", 62 Proc. ASIL (1968), pp.216–229, at pp.225–226.

18. M. Milic, Common Heritage of Mankind, p.17. Working Paper on Behalf of World Peace through Law Center, 1974.

19. A. Pardo, "Before and After", 46 LCP (1983), pp.95–105, at p.96.

20. UN Doc. A/C.1/PV.1589, para. 53.

21. Milic, op. cit., p.18.

22. UN Doc. A/AC.138/18, p.9. See also UN Doc. A/AC.138/SC.1/SR.12–29, p.18 (Canada).

23. Ibid., p.7.

24. UN Doc. A/AC.138/SC.1/SR.12–29, p.16.

25. Article 2 of the Outer Space Treaty in VI ILM (1967), pp.386–390, and later, Article 2(3) of the Moon Treaty in XVIII ILM (1979), pp.1434–41. See also the statement of the American representative to the General Assembly in 1967, UN Doc. A/C.1/PV.1524, para. 30.

26. UN Doc. A/Ac.138/18, p.9.

27. See, e.g., UN Doc. A/AC.138/SR.28, p.118; A/AC.138/SR.72 (the United States).

28. UN Doc. A/AC.138/SR.58, p.201 (The Netherlands).

29. UN Doc. A/C.1/PV.1788, para. 53 (Belgium).

30. See UN Doc. A/C.1/PV.1592, para. 34 (The Soviet Union). According to the Soviet writers, the present world is divided into three socio-economic systems: capitalist, socialist and Third World. While in the capitalist countries ownership is concentrated in the hands of monopolies, the socialist countries enjoy the system of national ownership. These

writers also believe that the majority of Third World countries are in the process of shaping their national economic structure. See also Ogley, op. cit., p.35.

31. UN Doc. A/C.1/PV.1592, paras. 35, 37.

32. UN Doc. A/C.138/SR, pp.22, 41 (The Soviet Union).

33. UN Doc. A/AC.138/SC.1/SR.12-29, pp.26-27 (The Soviet Union).

34. UN Doc. A/C.1/PV.1592, para. 26 (The Soviet Union).

35. UN Doc. A/Ac.138/SR.38, p.15 (The Soviet Union).

36. UN Doc. A/C.1/PV.1798, para. 59.

37. See Chapter One supra note 32.

38. UN Doc. A/C.1/PV.1788, para. 7 (Peru).

39. UN Doc. A/C.1/PV.1673, para. 69 (India).

40. UN Doc. A/C.1/PV.1850, para. 67 (Jamaica).

41. Off. Rec., Vol. III, p.53 (Sri Lanka).

42. R. Galindo Pohl, "Latin America's Influence and Role in the Third Conference on the Law of the Sea", 7 ODIL (1979), pp.65-87, at pp.84-85.

43. These countries included Argentina, Brazil, Chile, Ecuador, El Salvador, Nicaragua, Panama, Peru and Uruguay. See the 1970 Montevideo Declaration of Principles on the Law of the Sea, in S. Oda, op. cit., Vol. 1, pp.347-348. Leiden: Sijthoff, 1972.

44. UN Doc. A/C.1/PV.1788, para. 15 and A/C.1/PV.1918, para. 11 (Peru); AC.1/PV.1600, pras. 18-19 (Honduras) This was not restricted to the Latin American countries; some other developing states were also suspicious about an interpretation of the common heritage which could lead to limitations in the territorial sea and the continental shelf. See, e.g., UN Doc. A/AC.138/SR.54, p.115 (Algeria).

45. For more details of the NIEO, see Chapter Five, Section III.

46. UN Doc. A/AC.138/SR.65, p.58 (Algeria).

47. UN Doc. A/Ac.138/SR.34, p.61 (India).

48. UN Doc. A/C.1/PV.1674, pp.7-10 (Brazil).

49. UN Doc. A/AC.138/SR.30, p.14 (Chile).

50. UN Doc. A/AC.138/SR.64, p.46 (Columbia).

51. See, e.g., UN Doc. A/C.1/PV.1674, para. 91 (Nigeria).

52. UN Doc. A/C.1/PV.1784, para. 62.

53. There were some efforts on the part of the G77 to give a legal content to the common heritage principle. Chile, e.g., defined it as an indivisible property with fruits that can be divided (UN Doc. A/C.1/PV.1775, para. 13).

54. Off. Rec., Vol. 1, p.197, para. 30.

55. UN Doc. A/C.1/PV.1675, para. 104.

56. UN Doc. A/C.1/PV.1678, para. 109 (Venezuela).

57. Ibid., para. 62 (Island); A/C.1/PV.1673, para. 35 (Ceylon).

58. UN Doc. A/AC.138/7, pp.7-14.

59. UN Doc. A/AC.138/18, Add. 1, p.2.

60. UN Doc. A/AC.138/7, pp.7-14.

61. Such as General Assembly Resolutions 2467 (1968), 2574 (1969), 2749 (1970), 2881 (1971), 3029 (1972), 3067 (1973), 3334 (1974), 3483 (1975), 31/63 (1976).

62. UN Doc. A/C.1/PV.1527, para. 126 (Sweden).

63. UN Doc. A/C.1/L.480/Rev.1 and Add.1-2.

64. See UN Doc. A/C.1/PV.1709, para. 90.

65. Ibid., para. 35 (Norway).

66. R. Young, "Deep Sea Mining", in 1970 ILA Report, p.828.

67. See Chapter Two, Section II (c).

68. UN Doc. A/7230, p.47, para. 33.

69. UNTS, Vol. 402, p.72.

70. UNTS, Vol. 610, p.205.

71. UN Doc. A/7230, p.46, paras. 30 and 43.

72. J.P. Dupuy, "The Notion of the Common Heritage of Mankind Applied to the Seabed", in Rozakis, op. cit., pp.199-208, at p.201.

73. Bin Ching, "United Nations Resolutions on Outer Space: 'Instant' International Customary Law?", 5 IJIL (1965) pp.23-48, at p.24.

74. L. Henkin, "Whose is the Bed of the Sea? Remarks", 62 Proc. ASIL (1968), pp.243-246, at p.245.

75. See, e.g., UN Doc. A/AC.138/SR.29, p.10 (The United States).

76. UN Doc. A/C.1/PV.1781, para. 6 (El Salvador).

77. UN Doc. A/C.1/PV.1774, para. 40.

78. The vote on Resolution 2749 (XXV) very often obscures the fact that the interpretation of different groups of states of the common heritage principle varied considerably. See, e.g., L. Juda, "UNCLOS III and the New International Economic Order", 7 ODIL, pp.221-255, at p.226, 1979.

79. See, e.g., Draft Resolution, UN Doc. A/AC.138/SC.1/L.2 reproduced in the 1970 Report of the Sea-Bed Committee, UN Doc. A/8021, p.29. For the view of the G77 on the 3rd preambular paragraph, see, e.g., UN Doc. A/C.1/PV.1782, para. 63 (The Philippines).

80. UN Doc. A/AC.138/25, Article 3 (The United States) and A/7622, p.14, para. 24.

81. T.G. Kronmiler, The Lawfulness of Deep Seabed Mining, Vol. 1, p.250. New York: Oceana, 1980.

82. Ibid., pp.310-311.

83. UN Doc. A/PV.1933, para. 244 (Ceylon).

84. UN Doc. A/C.1/PV.1799, para. 21 (The United States).

85. Kronmiler, op. cit., p.269.

86. UN Doc. A/C.1/PV.1781, para. 17.

87. UN Doc. A/C.1/PV.1799, para. 24 (The United States).

88. Ibid.

89. UN Doc. A/C.1/PV.1781, paras. 22-26 (El Salvador).

90. Ibid., para. 25. A/C.1/PV.1775, para. 17 (Chile). Peru, referring to this paragraph, said: "The mention of the relevant rules of international law is acceptable only in very general terms, referring to relations among States, since as far as exploitation of the sea-bed beyond national jurisdiction is concerned, we are confronted with a complete absence of rules, and the purpose of our task is precisely to fill that vacuum. UN Doc. A/C.1/PV.1777, para. 31.

91. UN Doc. A/C.1/PV.1799, para. 25 (the United States).

92. See, for example, K. Skubissewski, "La nature juridique de la 'Declaration des principles' sur les fonds marins", 4 Annales d'etudes internationales (1973), pp.237-47, at p.242.

93. According to Goldie, to the United States the common heritage concept "means no more than commonness of a common field wherein all may pasture their stock, or a common well wherefrom all may draw their water, or a common stream in which all may fish, its commonness means that no state may assert exclusive, territorial sovereignty over any part of it". See I.F.E. Goldie, "A Note on Some Diverse Meanings of the 'The Common Heritage of Mankind'", 10 Syr.JIL.Com. (1983), pp.69-112, at pp.80-81.

94. See, e.g., UN Doc. A/C.1/PV.1777, para. 49 (Australia).

95. It is believed that this ambiguity was intended, because "In no other way could the disparate positions of the developed and developing countries have been subsumed within a single statement of principles". See Kronmiller, op. cit., p.246.

96. Skubiszewski, op. cit., p.241.

97. UN Doc. A/C.1/PV.1774, para. 40.

98. See Ogley, op. cit., p.35.

99. UN Doc. A/C.1/PV.1798, para. 60.

100. Ibid., paras. 53-56. See W.E. Butler, "The USSR and the Limits to National Jurisdiction over the Sea" in Yates and Young (eds.), Limits to National Jurisdiction over the Sea, pp.177-206, at p.200. Charlottesville: the University of Virginia, 1974. According to Butler, "Soviet maritime lawyers find the provision regarding the interest and needs of the developing countries as unjustified. In their view, this issue should be resolved with due regard to the socio- political structure of the contemporary world. So it would be only just to deduce a percentage of seabed revenues from former colonial powers or capitalist monopolies, since they are responsible for the economic backwardness of the developing countries . . ." They conclude that it would be unfair of the developing countries to impose a joint liability for their economic backwardness on both the imperialist colonial powers and the socialist countries.

101. The Philippines delegation at San Francisco in 1945 made a proposal to the United Nations Conference on International Organization to endow the General Assembly with legislative power. See Document of the United Nations Conference on the International Organization, Vol. III, pp.536-537. This Conference refused this proposal by 1 vote against 26.

102. See G.R. Landi, "The Changing Effectiveness of General Assembly Resolutions", 58 Proc. ASIL (1964), pp.162-170, at p.162; D.P.

O'Connell, International Law, Vol. I, pp.26-27. London: Stevens, 1970.

103. M. Sorensen (ed.), Manual of Public International Law, pp.160-161. London: Macmillan, 1968; F.B. Sloane, "The Binding Force of a 'Recommendation' of the General Assembly of the United Nations", 25 BYIL (1948), pp.1-33, at p.6.

104. An example of such a resolution is the Universal Declaration of Human Rights.

105. R.A. Falk, "On the Quasi-legislative Competence of the General Assembly", 60 AJIL (1966), pp.782-791, at p.789.

106. L. Henkin, Law for the Sea's Mineral Resources, p.53. New York: The Institute for the Study of Science in Human Affairs of Columbia University, 1969.

107. C. Parry, The Sources and Evidence of International Law, p.21. Manchester University Press, 1965.

108. See, e.g.,"Voting Procedure on Questins Relating to Reports and Petitions concerning the Territory of South-West Africa Case", ICJ Reports 1955, p.67, at p.115; "Certain Expenses of the United Nations Case", ICJ Reports 1962, p.151; "South- West Africa Cases, Second Phase", ICJ Reports 1966, p.6, at pp.50-1; "Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion", ICJ Reports 1971, p.16, at p.50.

109. South-West Africa Cases, Second Phase, ICJ Reports 1966, pp.50-1.

110. Namibia Advisory Opinion supra note 106, p.50.

111. E.D. Brown, "Freedom of the High Seas versus the Common Heritage of Mankind: Fundamental Principles in Conflict", 20 SDLR (1983), pp.521-60, at p.540.

112. See, e.g., UN Doc. 138/SC,1/SR.24, p.178 (Mexico).

113. UN Doc. A/C.1/PV.1777, para. 49 (Australia).

114. Amerasinghe, in a speech before the General Assembly Plenary Meeting said: "The Declaration cannot claim the binding force of a treaty internationally negotiated and accepted, but it is a definite step in that direction and . . . it has . . . that fervent element of moral authority that is more binding than treaties". UN Doc. A/C.1/PV.1933, para. 245; see also A/C.1/PV.1781, para. 16 (El Salvador).

115. Ibid. (El Salvador).

116. UN Doc. A/C.1/PV.1780, para. 77.

117. D'Amato argues that international law emerging from consensus in the General Assembly resolution, will be binding on all states which voted for the resolution, or on states which abstained in the relevant vote, but not on states which voted against the resolution. See D'Amato, "On Consensus", 8 Cand. YBIL (1970), p.120.

118. UNCTAD Resolution 51 (111), paras. 1 and 3, in Oda, International Law of the Ocean Development, Vol. II, p.19. Leiden: Sijthoff, 1975.

119. Ibid., p.20.

120. Off. Rec., Vol. III, p.33, para. 36.

121. Ibid., p.45, para. 6.

122. Ibid., p.8, para. 31.

123. According to the representative of the Netherlands, it was neither necessary nor advisable to link up jurisdiction and benefits, "since a suitable part of the revenues from the exploitation activities could be transferred to the developing countries in accordance with their needs, thus promoting the basic purpose of the concept of a common heritage". See Off. Rec., Vol. I, p.140, para. 21.

124. Off. Rec., Vol. VI, para. 22.

125. Ibid., p.77, para. 42.

126. UN Doc. A/9631, p.55.

127. 18 UNCTAD C..1, UN Doc. TD/B (XVIII)/SC.1/L.2.

128. Five of the technologically advanced countries, namely, The F.R. Germany, France, Japan, the U.K. and the U.S. voted against this resolution, and defended their position by emphasizing the interim nature of national legislation. See ibid.

129. Off. Rec., Vol. IX, para. 22.

130. Ibid.

131. Ibid., p.82.

132. Ibid., p.104, para. 27.

133. Ibid., para. 28.

134. Ibid., para. 27.

135. Annex to the General Assembly Resolution 34/68 of 5 December 1979, reprinted in 18 ILM (1979), pp.1434-1441.

136. C.Q. Christol, "The Moon Treaty Enters into Force", 79 AJIL (1985), pp.163-168, at p.168. The Agreement entered into force in 1984 after the deposition of the fifth ratification. The ratified states include Australia, Austria, Chile, Netherlands, Pakistan, Philippines and Uruguay. France, upon its signature, declared that the provisions of Article 3, paragraph 2, of the Agreement relating to the use or threat of force cannot be construed as anything other than a reaffirmation for the purposes of the field of endeavour covered by the Agreement of the principle of the prohibition of the threat or use of force, which states are obliged to observe in their international relations, as set forth in the United Nations Charter. For the status of the Moon Treaty, see Multilateral Treaties Deposited with the Secretary- General: Status as at 31 December 1987. New York: United Nations, 1988.

137. The Moon Treaty, Article 18.

138. Christol, op. cit., p.164.

139. For a detailed discussion about the legislative history of the Moon Treaty and the development of the common heritage principle, see 74 Proc. ASIL (1980), pp.155-167.

140. The 1971 Resolution of the Ministerial Meeting of the Group of 77, in Oda, The International Law of the Ocean Development, Vol. I, pp.365-366.

141. 1972 Report of the Sea-Bed Committee, UN Doc. A/8721, p.72.

142. Goldie, op. cit., A Note, p.97.

143. S. Oda, op. cit., Vol. II, p.40.

144. Resolution CM/Res. 289 (XIX) of the Organization of African Unity, in Oda, op. cit., Vol. II, p.30.

145. Oda, op. cit., p.201.

146. Ibid., pp.41-44.

147. The chief delegate of the United States to the UNCLOS III in a hearing on Deep Sea-Bed Mining and the Law of the Sea before the sub-committee . . . of the U.S. House of Representatives in 1977 said: "The common heritage of mankind, as many have observed, is not just an abstract slogan. Our efforts can give it lasting operational meaning . . . . This is a clear objective of those of us representing the U.S. Government. See R.P. Anand, "The Legality of Interim Seabed Mining Regimes", 29 Foreign Affairs Reports (1980), pp.29-48, at p.32.

148. For example, the Tanzanian delegate, Warioba, who later assumed the chairmanship of the Preparatory Commission, in his intervention at the Plenary Meeting of the UNCLOS III in August, stated: "The Area and its resources were the common property of mankind, to be used for the benefit of all, especially the developing countries. Such was the only possible interpretation of the common heritage principle enshrined in General Assembly resolution 2749 (XXV). See Off. Rec., Vol. XIV, p.40, para. 141.

149. United States, Deep Seabed Hard Mineral Resources Act, 19 ILM (1980), pp.1003-1020..

150. Ibid., Section 2, para. (7), p.1003.

151. Ibid., Section 403, para. (d), p.1029.

152. Ibid., Section 403, para. (a), p.1019.

153. The F.R. of Germany, Act of Interim Regulation of Deep Seabed Mining, XX ILM (1981), pp.393-398.

154. Ibid., Section 1, para. 1.

155. Ibid., Sections 12 and 13.

156. United Kingdom, Deep Sea Mining (Temporary Provisions) Act 1981, XX ILM (1981), pp.1217-1227, at p.1221, para. 7.

157. Ibid., Article 10(1), p.1222.

158. Ibid., Article 10 (5), (6) and (7), p.1223.

159. The Union of Soviet Socialist Republics, Law on Provisional Measures to Regulate Soviet Enterprise for the Exploration and Exploitation of Mineral Resources, 21 ILM (1982), pp.551-553.

160. Ibid., p.551.

161. Ibid., para. 18, p.553.

162. France, Law on the Exploration and Exploitation of Mineral Resources of the Deep Seabed, ibid., pp.808-814.

163. Japan, Law on Interim Measures for Deep Seabed Mining, 22 ILM (1983), pp.102-122.

164. In fact the term 'mankind' did not preoccupy the traditional international law for a simple reason. This term was used in humanitarian law in a broad meaning, e.g., the U.N. Charter in its first preambular paragraph it is used. Several other treaties and resolutions of international organizations have referred to the interests and rights of mankind in matters such as the protection of human rights, the punishment of international crimes and the establishment of special juridical

regimes over space and resources, including outer space, the moon and other celestial bodies. Activities carried out in outer space have been declared to constitute the "province of all mankind". See the Treaty on Principles governing the Activities of States in the Exploitation and Use of Outer Space including the Moon and Other Celestial Bodies, Article I, 1967, 18 UST 2410. Mankind even has "envoys" in the persons of the astronauts sent into outer space. See Article 5 of the Outer Space Treaty. Before this treaty, mankind had never been recognized as the holder of specific economic rights and had not been provided with the institutional means to implement these rights. Finally, the Antarctic Treaty signed in 1959 also describes mankind. The Moon Treaty which entered into force in 1984 also spoke about mankind. See supra note 135.

165. Italy, Law on the Exploration and Exploitation of the Mineral Resources of the Deep Seabed, 24 ILM (1985), pp.983-996.

166. Ibid., p.991.

167. India, in 1974, at the first substantive session of the UNCLOS III, said: "The concept of the common heritage of mankind was not only a conventional norm but a peremptory norm of international law from which no derogation was permitted". See Off. Rec., Vol. III, para. 23 (India).

168. UN Doc. A/CONF.62/L.58 (Chile).

169. Vienna Convention on the Law of Treaties, Article 53.

170. M. Lachs, "The Development and General Trends of International Law in Our Time", 169 RDC (1980-IV), pp.11-377, at p.210, 1980.

171. Anand contends that, "There is little doubt that the basic tenets of the common heritage principle have to be universally accepted and have become jus cogens". See R.P. Anand, "U.N. Convention on the Law of the Sea and the United States", 24 IJIL (April, 1984), pp.153-199, at p.193.

172. R. Wolfrum, "The Principle of the Common Heritage of Mankind", 43 ZaoRV (1983), pp.312-337, at p.336.

173. See Article 1(1)(1) of the Convention.

174. The Convention in Article 133(b) makes a distinction between the resources and minerals.

175. S. Grove, "The Concept of 'Common Heritage of Mankind': A Political, Moral or Legal Innovation?", 9 SDLR (1972), pp.390-403, at pp.398-399.

176. "We the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in

our lifetime has brought untold sorrow to mankind." (first preambular paragraph).

177. Treaty on Principles Governing the Activities of States in the Exploitation and Use of Outer Space including the Moon and other Celestial Bodies, Article 1, in 18 UST 2410. Reference to mankind as a new subject of international law was made in the Outer Space Committee too. See, e.g., UN Doc. A/AC.105/C.2/SR.75.

178. Ibid., Article 5.

179. Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1987. New York: United Nations, 1988.

180. Wolfrum believes that the provisions of Article 137(2) and 157(1) of the Convention together amount to the fact that the participants with respect to the utilization of the common heritage are states and not "mankind" as an independent subject of international law. Wolfrum, op. cit., p.319.

181. Wolfrum opposed the reference to mankind as a subject of international law. See ibid.

182. Wolfrum, op. cit., p.317. Conforti maintains: "It is the individual state which, as the French theory of dedoublement functioned has once and for all shown, acts not only on its own but also in the absence of an institutional organization of the international community, in the capacity of an organ of the community itself". See B. Conforti, "Unilateral Exploitation of Deep Seabed", 4 IYBIL (1978-79), pp.3-19, at p.11-89.

183. The Convention, Article 162(2)(o)(i). See also Article 1 of the UN Charter and Article 1 of the Convention on Human Rights of 16 December, 1966.

184. B. Zuleta, "The New Law of the Sea: Balance of Rights and Duties", in The Management of Humanity's Resources: The Law of the Sea (Workshop, 1981), p.371. The Hague Academy of International Law-United Nations University, 1982.

185. Article 137(1) of the Convention.

SECTION I: GENERAL PRINCIPLES

Almost all issues related to sea-bed activities are characterized by the clash between two general principles of international law: the common heritage of mankind and freedom of the high seas supported by the developing and developed countries respectively. The Parallel System of exploitation of the sea-bed and its resources is no exception to this statement. Since the exploitation system embodied in the Convention is essentially based on the common heritage principle, the unilateral laws of a few technologically advanced countries provide for a system of exploitation based on the principle of the freedom of the high seas.

As regards the development of the Parallel System for the sea-bed resources, the period between 1967 and 1982, when the Convention on the Law of the Sea was adopted, can be divided into three parts. The first, which lasted until 1977, started with a hopeful optimism for an agreement on an international system of exploitation. These hopes proved groundless, and the deep sea-bed and its resources resulted in a problematic issue. The strong will of all states to save the outcome of many years of careful work generated a significant compromise relating to the role of states and private entities in the sea-bed activities. The negotiations following this compromise included the second part which lasted until 1980 when genuine hopes for the establishment of a viable, albeit not ideal, Parallel System appeared. The third part coincides with the refusal of the Reagan administration to sign the 1982 Convention.

In this chapter, after an overview of the development of the system of exploitation since 1967, the articles of the Convention and the main aspects and legal implications of the domestic laws of the industrialized countries in this respect shall be examined.

SECTION II: THE DEVELOPMENT OF THE PARALLEL SYSTEM IN THE UNITED NATIONS BETWEEN 1969 AND 1976

From the early days of the discussions in the United Nations, it was clear that there was a consensus on the establishment of an international management for the exploitation of the sea-bed resources. The establishment of the Ad Hoc Committee in 1968 affirms the fact that no state believed at that time that unilateral exploitation of deep sea-bed resources on the basis of national laws and as an exercise of the freedom of the high seas was either desirable or consistent with existing international law.[1] International arrangements, nevertheless, meant different things to different states or groups of states. The nature of international arrangements was provided to answer the question "who should exploit the sea-bed?"

For the Group of 77, internationalization of the sea-bed meant the realization of the goals of the common heritage principle by establishing an international organization which would exclusively carry out the exploitation of the resources of the Area and would ensure an equitable sharing of profits between all nations.[2]

For the developed countries which did not define the common heritage of mankind as common property, on the other hand, the main purpose was to establish a licensing system under a new subsidiary organ of the United Nations in order to issue licences for exploitation against receiving a reasonable fee for covering its administrative expenses. Some of these developed countries further contended that each licence holder should, in addition, pay a royalty to the United Nations organ for distribution among states parties to the international arrangements.[3]

In brief, for the developing countries, internationalization of the sea-bed was the outcome of the principle of the common heritage of mankind and an important step towards the establishment of a New International Economic Order which should provide for a de facto equality of states by creating compensation and preferential rules in favour of these countries.[4] For the industrialized countries, the nature of sea-bed activities in the sea-bed area, which require exclusive rights to a huge area for a long time, as well as uncertainties of the rules of international law in that respect, rendered the establishment of an international arrangement inevitable.

(a) Exploitation of The Area for Peaceful Purposes

Although disagreements as to the purposes of internationalization and the answer each state or group of states had to the question of "who should exploit the deep sea-bed", there were a few principles that both developing and developed countries agreed upon.

The first principle was that the area of the sea-bed should be reserved only for peaceful purposes. Reference to the peaceful uses of the deep sea-bed was with regard to similar provisions in the Outer Space Treaty of 1967 (Article IV) and to the Antarctic Treaty of 1959 (Article 1). The General Assembly Resolution 2340 (XXI) of 18 December 1967 laid down two main objectives for the Ad Hoc Committee: reservation of the deep sea-bed exclusively for peaceful purposes, and the use of its resources for the benefit of mankind.

The objective of reservation of the deep sea-bed exclusively for peaceful purposes was so important that in the opinion of some states the realization of the second objective, i.e., the exploitation of the resources of the Area for the benefit of mankind was dependent on the meaning which would be attached to peaceful uses of the sea-bed.[5] The expression "peaceful uses" was considered to be a flexible concept with different meanings to different states. For the United States, the test of a "peaceful" activity was whether that activity was consistent with the United Nations Charter and other obligations of international law.[6] Since the Charter recognizes the right of self-defence, defensive military acts, according to the United States, were to be considered as peaceful.[7]

The question of the use of the sea-bed only for peaceful purposes was of the utmost significance to the Soviet Union. For this country, the expression "peaceful" was equal to total prohibition of any military activity on the sea-bed beyond the limits of the territorial sea.[8] In the Soviet opinion, the phrase "beyond the limits of national jurisdiction" meant the application

of the concept of peaceful uses to the area beyond the limits of the national jurisdiction of states was that it brought within the realm of this principle the continental shelf which was the area most likely to be used for military purposes in the immediate future. In support of the proposition that military use of the continental shelf be banned, it was held that Articles 2, 3, 4 and 5 of the Geneva Convention on the Continental Shelf limited the coastal states' right to exploration and exploitation of the natural resources of the shelf and did not give the coastal states unlimited jurisdiction over it. According to this view, the military use of the sea-bed underlying the high seas beyond territorial seas, in the area of the continental shelf would inevitably affect the peaceful exploration and use of the sea-bed and the ocean floor beyond the limits of national jurisdiction.[9] In fact, the Soviet Union preferred to use "beyond the limit of the territorial sea".[10] There were some other states which shared the Soviet interpretation of "peaceful uses". For example, Sweden, in reply to the Secretary-General's note verbale concerning the work of the Ad Hoc Committee wrote:

> . . . a prohibition against the use of the ocean-bed for any kind of military undertaking would undoubtedly lessen the temptation of extending national jurisdiction over that area. The resistance towards the internationalization of the ocean-bed would also become much weakened if it were to be used only for peaceful purposes. 11

Since 1969, many delegates to the Sea-Bed Committee started suggesting that one question of the demilitarization of the sea-bed would be dealt with in the Committee of Disarmament, and priority was gradually given to the second question, namely, the exploitation of the sea-bed resources for the benefit of mankind. The step

taken by the United States and the Soviet Union in concluding the "Treaty on the Prohibition of the Emplacement of Nuclear Weapons and other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and the Subsoil Thereof"[12] in 1971, "increased concern about the peaceful uses of ocean space and paved the way for more relevant measures in the future",[13] but like the Outer Space Treaty, it prohibited only specific uses of some specifically defined nuclear weapons, and was not the final and acceptable answer to the demand for complete demilitarization of the sea-bed. There were many countries which saw in "peaceful uses" much more than non-military uses, and believed that a much wider definition should be attached to that expression. The representative of Ecuador, e.g., speaking about the adverse impact of sea-mining on the economy of the developing producing countries of the minerals to be exploited from the sea-bed, said that "a particularly important aspect of the violation of the concept of peaceful uses was the kind of economic aggression involved in the extraction of minerals from the sea-bed". He further suggested that "the future convention on the law of the sea must clearly define the concept of peaceful uses".[14]

As regards the Area, Article 141 of the Convention specifies the exclusive use for peaceful purposes without providing any definition for that concept.[15] However, an attempt is made to give such a definition in Article 301 of the Convention under the title of "Peaceful uses of the Seas". This article, which is adopted on the basis of Article 2(4) of the Charter of the United Nations,[16] reads:

> In exercising their rights and performing their duties under this convention, States Parties shall refrain from any threat or use of force against territorial integrity or political

> independence of any State, or in any other manner inconsistent with the principles of international law embodied in the charter of the United Nations.

Neither the view of the Soviet Union nor that of Ecuador has found expression in this article, and its content seems to reflect the position of the United States. Article 301 may be construed as suggesting that only aggressive activities in the sense of Article 2(4) of the Charter are inconsistent with the concept of "peaceful uses", and probably non-aggressive military activities carried out by military personnel but for non-military purposes are permitted. This assumption is based on the fact that the words "inconsistent with the purposes of the United Nations" in Article 2(4) of the Charter are replaced, in Article 301 of the Convention, by "inconsistent with the principles of international law embodied in the Charter of the United Nations".[17] The question of defining "peaceful uses" or "peaceful purposes" in relation to deep sea mining was not a hard-core issue at the Conference, and the formula incorporated in Article 301 of the Convention was ambiguous enough to be acceptable to more or less all delegations.

(b) Exploitation of the Resources for the Benefit of Mankind

Resolution 2340 (XXII) provided for the exploitation of the sea-bed resources in the interest of mankind. The whole system of exploitation of the sea-bed resources which was negotiated at the Sea-Bed Committee and later at the UNCLOS III had this objective as its guiding principle, and the Convention which has come into existence as a result of deliberation at these fora contains

provisions which are meant to preserve the interests of mankind in deep sea mining to the highest extent. Here the main problem was how states interpreted "benefit or interest of mankind".

For the developing countries, the de facto inequality of states required a preferential treatment in favour of those countries. Benefit of mankind to them meant, inter alia, special regard to the needs and interests of the developing countries in order to establish a New International Economic Order, and thereby to restructure international relations on the basis of a de facto equality of states. The representative of Ecuador in the First Committee of the General Assembly in 1969 explicitly interpreted the concept of the benefit of mankind as "using the net proceeds [of the deep sea-bed mining] for the economic promotion of the developing countries, whether they have a sea-coast or not".[18] The industrialized countries saw the benefit to mankind in increased wealth, improved technology, the ability to exploit sea-bed resources more economically than on land and a greater affluence for themselves which would indirectly benefit other countries.[19]

"Benefit of mankind" had originally a dominant economic character both for developing and developed countries,[20] and contained a right to an equitable sharing of benefits from sea-bed mining for developing countries and a duty to make different sorts of payments in connection with deep sea mining by industrialized countries. Deliberations at the Sea-Bed Committee gradually widened, at least for the developing countries, the scope of this concept in order to give more importance to non-economic elements. Transfer of technology, protection of the marine environment against pollution, and enhancement of marine scientific research in the deep

sea-bed were the most important of these factors. This was indeed a logical development, because the philosophy behind the principle of the common heritage of mankind required the provision of all possible preferential treatment for the developing countries, and not only financial ones, in order to change a de jure equality to a de facto equality, and as far as deep sea-bed mining was concerned, to put them on the same footing as the industrialized countries.

The Declaration of Principles of 1970 was an effort to get together the elements of agreements between states in one single document which would constitute solid ground for future negotiations on the legal regime for the deep sea-bed. The principle of benefit of mankind was incorporated in paragraph 7 of this declaration. Promotion of scientific research in the area and prevention of pollution in the marine environment were mentioned in paragraphs 10 and 11 respectively.

One of the principles which developed in close relation with the concept of benefit of mankind was the protection of the marine environment from pollution. The fear of pollution was not only because of the effect of the future exploitation of the deep sea-bed on the ecological balance of the marine environment, but still more on account of the prevailing risk of pollution caused by dumping of hazardous elements such as nerve gas in the sea-bed.[21] Because of the nature of the risk which existed equally for both the developing and developed countries, the question of establishing preventive measures against marine pollution was easily settled, and agreements were reached without much difficulty about the implementation of these measures.[22] Paragraph 11 of the Declaration of Principles dealt with the prevention of pollution resulting from activities in

the Area, and the same was incorporated in Article 145 of the Convention.

Whereas the principles of reservation of the Area for peaceful purposes and the prevention of pollution were soon left aside as more or less clear items, other issues related to the question of "who should exploit the Area" and connected with the concept of the benefit of mankind, such as the equitable sharing of benefits, participation of all states in the activities, transfer of technology and production control, continued to be subject to conflicting interpretations and contradicting attitude-takings by the states.

(c) Original Negotiating Situations

Several proposals by different states to the Sea-Bed Committee concerning the conditions of the regime to be established were suggested. These proposals showed the degree of disagreement of opinions in this respect which was mostly influenced by ideological and political differences. Major Western states, such as the U.S., the U.K., France, Japan and Canada, as well as several Latin American and African states, submitted their own proposals. The content of these proposals as regards the nature of the regime, the functions of the international organization and the meaning which was attached to the benefit of mankind and ensuring principles were different. At one extreme was the French proposal with much emphasis on economic efficiency,[23] and the assertion that such efficiency was irreconcilable with the establishment of an

international organization with considerable powers.[24] France, in this proposal, was not prepared to recognize any competence for the international organization to collect taxes on production from the resources, and considered it more to the benefit of mankind if the state concerned, itself contributed an appreciable share of the taxes levied on the exploitation to an "international, regional or bilateral programme of assistance to developing countries which it may select".[25]

The Tanzanian proposal was at the other extreme. It envisaged "an international organization with exclusive rights for exploration and exploitation of the sea-bed resources".[26]

Between these extremes, there were proposals which gave certain powers to the international organization. In the United States proposal, the international organization issued licences for sea-bed resources exploitation but it did not engage in the activities itself. It also had they duty of supervision of the compliance of the operations with the rules established in the regime and collection of all payments.[27]

Discussions at the Sea-Bed Committees only revealed the sharp contradiction between the G77 and the technologically advanced countries, and the wide differences of views culminated in a disagreement at the end of the first substantive session of the UNCLOS III in Caracas in 1974.[28] This disagreement had its roots in developments outside the forum of negotiations for a sea-bed legal regime. The Arab oil embargo in 1973 in the context of the Organization of the Petroleum Exporting Countries (OPEC), which was a prototype of the unity of the developing countries, and the immediate effect of that embargo, demonstrated, on the one hand, the

power of these countries as a political force and, on the other, the dependability of the industrialized states on the raw materials exported by the developing countries.[29] Therefore, it turned the question of unrestricted access to the resources of the sea-bed into a highly important issue of national security for the developed countries.

The programme of a New International Economic Order was highlighted in 1974 by the adoption at the General Assembly of The Charter of Economic Rights and Duties of States. It was, therefore, reasonable that the negotiations about the legal regime for the sea-bed at the UNCLOS III became, to the developing countries, a testing ground for taking a decisive step towards the establishment of a New International Economic Order, and with regard to the developments of 1973 and 1974, they felt in a stronger negotiating position for that purpose. On the other hand, the industrialized countries found themselves in a more or less confrontational situation where they had to secure for themselves the right of free access to the sea-bed while undertaking minimum international obligations.

1. Disagreement on the issue

The First Committee of the UNCLOS III, which dealt with the question of the sea-bed legal regime, received, in the 1974 Caracas sessions, four different proposals which revealed the degree of opposition of opinions at that time. Three of these proposals, submitted by the United States, the EEC countries and Japan, advocated the freedom of states and private entities supported by

states to participate in the activities in the sea-bed.[30] These three proposals generally divided the activities into three aspects: prospecting, evaluation and exploitation. There was no need to go into any particular arrangement for prospecting; all applicants had only to inform the Authority of their intent. For the evaluation and exploitation aspects, the applicant had to enter into some "legal arrangement", perhaps in the form of contracts which obliged it to comply with the regulations imposed by a future convention with regard to the rights and duties of other states in the Area and not the rights of the international community represented by the Authority. No elements of the principle of the benefit of mankind, such as sharing of benefits, transfer of technology or participation of all states in the exploitation, were mentioned in these proposals.[31]

The fourth proposal, submitted by the G77, gave a controlling role to the Authority.[32] According to this proposal, the title to the Area and its resources was vested in the Authority (Article 1), and it was only the Authority who should decide how and to whom this title might pass (Article 2). The Authority might enter into joint venture contracts relating to the activities in the Area (Article 5), but these contracts should ensure the effective control of the Authority at all times (Article 4). Those who made a contract with the Authority concerning the activities in the Area should provide the necessary funds, materials, equipment, skill and know-how (Article 12), and at the same time be held responsible for any risk arising out of the conduct of operations (Article 13). The Authority required all contracts to undertake to transfer their technology to the Authority [Article 15(a)] and to train personnel

from developing countries [Article 15(c)]. It seemed that, except for ensuring security of tenure to the contractor (Article 10), the Authority only enjoyed rights, and if it had any duties at all, they were generally against the international community and not the contractors. The comparison of the proposal of the G77 with those of the industrialized countries clearly demonstrates the conditions under which the first substantive session of the UNCLOS III started its work in 1974.

The G77 insisted on a direct relation between the questions of "who owns the Area" and "who should exploit it". According to them, since the Area and its resources belonged to humanity as a whole, the Authority as the agent of humanity should exploit it.[33] The industrialized countries, on the other hand, made a distinction between these two questions. Whereas it could be accepted that the Area was for the use of the international community, it was not acceptable that a supranational organization would exploit the resources as the sole agent of the humanity.[34]

The Soviet Union refused to give the Authority the right of exploitation, arguing that it was unrealistic to imagine such an organization would involve private companies in the activities on a contractual basis without submitting to their monopolistic interests and the need for a substantial return on their invested capital.[35] The Soviet Union instead suggested that only "states themselves must have the right to exploit the resources of the sea-bed in accordance with the convention and with licence obtained from the sea-bed organization".[36] Reference to the equitable distribution of the benefits among all states with special attention to the needs and interests of the developing countries was made by the Soviet Union

and it also proposed the reservation of some sections of the sea-bed in all the potentially richer areas for those countries which were unable to undertake the exploitation of resources immediately.[37]

The difference in interpretations from the principle of the benefit of mankind was best manifested in the discussions about the production control at the First Committee of the UNCLOS III in 1974. The problems of the adverse effects of deep sea-bed production on the economy of many countries had originally one dimension, i.e., the effects on the land-based producers of the same products. In 1974, the other dimension, namely the effects on the consumer, was also discussed. Generally speaking, the G77 was in favour of preventive and compensatory measures such as production and price control in order to defeat the adverse effects on those developing countries which were principal exporters of one or more of the four major minerals contained in manganese nodules. The industrialized countries, on the other hand, argued that production from the sea-bed not only could meet the increasing world demand for minerals, but it would also contribute to the stabilization of the prices which was eventually to the benefit of the majority of states which are the consumers.[38]

The huge gap between the developing and developed countries in 1974 concerning the system and conditions of exploitation of deep sea-bed resources continued for the years to come. What was clear was that any compromise system must contain several factors: it should give the Authority a role much more than a registrar; it should contain some arrangements for the distribution of the profits or taxes; and it should provide for some form of access of the technologically advanced countries to the deep sea-bed.

The first effort to reach a compromise solution was initiated by C.W. Pinto, the Chairman of the Working Group of the First Committee in Geneva in 1975. He presented a general paper entitled, "Basic Conditions of Exploration and Exploitation",[39] which was largely based on the proposal of the G.77 in 1974, but sought to accommodate the interests of the industrialized countries too. This compromise became possible by incorporating a system of parallel exploitation suggested by the United States. According to paragraph 3(d) of the said document, the Authority would designate sectors of the deep sea-bed for exploration and exploitation by contracting states. Paragraph 4 provided for the Authority to enter into contract with the Contracting States, or state enterprises, or natural or juridical persons, for any activity in the Area. Paragraph 7 of the document, which contained the innovative point of the American proposal concerning the Parallel System, read:

> Each applicant with respect to activities of evaluation and exploitation shall be required to propose to the Authority two alternative areas of equivalent commercial interests for the conduct of operations under a contract. The Authority shall determine one such area to be a reserved area in accordance with paragraph 8.

The main characteristic of this "Parallel System" was that those activities which were carried out by the states and private entities in their own areas were regulated by national law, and the Authority had no control over them. The Parallel System was meant to give ultimate control to the Authority over the activities in that area which belonged to it, and provide, on the other hand, for the unrestricted access of other entities to other parts of the area only subject to the legislation of their respective states.[40]

The ideological conflict continued in the 1975 Geneva session of the UNCLOS III. While the United States was against any cartelization of sea-bed minerals by the G77 in the same manner as the OPEC had been organized, some of the developing countries believed that no concession to the original position of the G77,[41] was permitted.[42] The Algerian representative elaborated on this point by saying that the G77 were not there "to negotiate with multinational corporations. They were not there to divide up the [international sea-bed] zone . . . because it was already common heritage".[43]

At the end of the Geneva Session, the ISNT containing a compromise text based on various proposals by states in regard to sea mining, was issued by the Chairman of the First Committee.[44] There was no mention of the Parallel System in this document and it was clearly inclined to the position of the G.77. The main objective of the exploitation system of sea-bed resources, according to Article 9 of the ISNT, was to foster the healthy development of the world economy, and for that, efforts should be made to avoid or minimize any adverse effects on the economies of the developing countries resulting from a substantial decline in their export earnings from minerals. The same article provided for the consideration of the optimum benefit of producers and consumers of minerals and equitable sharing of benefits, with particular attention to the interests and needs of the developing countries. According to Article 11, the Authority should take the necessary measures for promoting transfer of technology with regard to the Area, particularly to the developing countries. Article 18 specifically encouraged the participation of the developing

countries in the activities in the Area. The right to administer the Area, manage its resources and control the activities of the Area, was vested in the Authority by Article 21. The Authority, according to Article 22, enjoyed the discretion to decide if it wished to directly conduct the activities or determined to enter into service contracts or joint ventures with any state party or private entities under the control of the states parties. The contracts or joint ventures should always ensure the direct effective control of the Authority.

As is evident, the ISNT had conferred an almost unrestricted competence upon the Authority. The chief delegate of the United States in a later personal commentary considered Article 22 of the ISNT as the one most critical to the progress in the negotiations, because it made it possible for the Authority to conduct the operations directly and it might enter into arrangements with states or private entities only when and if it deemed it appropriate. He warned, "Unless there is a substantial qualification of this article to provide for assured access and production by states and their nationals, an underlying accommodation will not have been achieved".[45]

In the fourth session of the UNCLOS III, the ISNT relating to the sea-bed regime was negotiated at the First Committee, and as a result of those negotiations, a revised version of it was prepared by the Chairman of the First Committee according to the same arrangements agreed upon previously for the preparation of the ISNT.[46] The new document was called Revised Single Negotiating Text (RSNT).[47] The changes in the ISNT which resulted in the RSNT were mostly favourable to the industrialized countries.[48] For

example, Article 22 of the ISNT, which dealt with the functions of the Authority and had been strongly criticized by the industrialized countries, was reformulated in the RSNT. Whereas in the ISNT activities in the Area should be conducted by the Authority, in the RSNT, states parties or private entities under the control of states parties could conduct activities in association with the Authority and under its control. Another important change was in regard to the provision concerning the activities in the Area. In the ISNT, the activities in the Area were required to be governed by, inter alia, the regulation and supervision by the Authority.[49] This is modified in the RSNT to be governed by the provisions of Part I of the Convention.[50] The industrialized countries preferred to have all the provisions clearly articulated in the Convention so that the possibility of the emergence of unforeseen situations raised by the regulations adopted in future by the Authority could be curtailed.

The main change that could be considered favourable to the developing countries was in provisions concerning the adverse effects of deep sea mining activities on the economies of these countries. Article 9(6) of the ISNT provided that the activities in the Area should be conducted in such a manner as to avoid or minimize these adverse effects without elaborating any practical measures for that purpose. The RSNT proposed three measures in order to achieve that goal: 1- international commodity arrangements to which the Authority could become a party; 2- production limitation for an interim specified period; and 3- a compensatory system of economic adjustment assistance.[51] The idea of temporary production limitation was suggested in April 1976 by the Secretary of State of the United States, Henry Kissinger, outside the forum of

the Conference as a compromise gesture to minimize the fears of the land-based developing producers for adverse effects of the future deep sea mining on their foreign exchange incomes.[52]

The fifth session of the UNCLOS III in 1976 did not produce any new negotiating text, but several working papers concerning the system of exploitation and the power of the Authority were submitted to the First Committee, and Kissinger, once again outside the Conference, made two important concessions on behalf of the United States.[53] He announced that the United States would be prepared to ensure the financing of the Enterprise so that it could start mining activities concurrently with states and private entities, and would also be prepared to include in the Convention agreed provisions for the transfer of technology.[54] This was, anyhow, a general statement and subject to different interpretations. The other concession by Kissinger was the proposal for a periodic review of the system. The G77 generally insisted that, even if the Parallel System were accepted, there should be arrangements in the Convention that, after a specified period of time, this system would cease in favour of a unitary system of exclusive exploitation by the Authority. The American proposal, though set forth in a very vague formulation, could mean a review of the operation of the Parallel System, which was in line with the demands of the G77.

The working papers submitted to the First Committee in this session were in fact reactions to the RSNT. The G77, which considered the RSNT as favourable to the industrialized countries, presented the first working paper[55] in which it was proposed that activities in the Area should be conducted exclusively by the Authority either through the Enterprise or through a form of

association between the Authority and states parties or public or private entities [Article 22(1)]. Activities of the Enterprise should be conducted in accordance with a formal written plan, but activities in association with states or other entities should be conducted pursuant to a contract with the Authority. Article 8 of the Annex in this working paper of the G77 gave the Authority the freedom to decide which criteria it required for concluding a contract with an applicant. The purpose was to ensure that the Authority would not be forced to accept any proposed plan of work. The working paper of the G77 was criticized by the industrialized countries as reflecting the original position of that group in the Caracas session in 1974.

Both the Soviet and the American proposals[56] recognized the right of the Authority to directly conduct the activities in the deep sea-bed. The Soviet proposal provided for the states parties also to directly engage in the activities [Article 22(1)]. States had to enter into contracts with the Authority for that purpose, and the Authority had to ensure the right of all states parties to participate in the activities in the Area irrespective of their geographical location, social system and level of industrial development [Article 22(2)]. The U.S. proposal recognized for the Authority the right to directly conduct the activities, but unlike the proposal of the G77, required the Enterprise to enter into contracts with the Authority [Article 22(1)]. Article 8 of the annex in the American proposal stipulated that, in the event an applicant met all the requirements laid down in the Convention, the Authority might not refuse to enter into a contract with him.

The working paper of the G77 received the support of several industrialized countries such as Canada, Australia and New Zealand. The American proposal had the support of the EEC and Japan.

At the end of the fifth session, it was clear that the Conference faced a deadlock in regard to the exploitation system of deep sea-bed resources. The Chairman of the First Committee, Engo, in his report at the end of the work of the Committee, gave a very pessimistic picture of the status of negotiations, and formulated the central and most difficult problem before the First Committee in the form of three questions: 1- Should the system of exploitation provide for a guaranteed permanent role in sea-bed mineral exploitation for states parties and private firms? 2- Should such a role for states parties and private firms be considered only at the option of, and subject to conditions negotiated by, the Authority? 3- Should their role be conceived of as essentially temporary, to be phased out over a defined period agreed to beforehand?[57]

One of the members of the American delegation to the Conference in 1976, in an article about the work of the Conference, referred to the North-South differences which had prevented the progress of negotiations and complained that "negotiations have been used as an occasion to press these differences in a display of group unity".[58] The Chairman of the First Committee, aware of this link the Group of 77 tried to make between the sea-bed legal regime on the one hand and the North-South dialogue and the establishment of a New International Economic Order on the other, made an effort to elaborate on the objectives of the developing countries which, in his view, had changed by recognizing their interest in cheap and reliable supplies of metals. He added that what divided the

industrialized from developing countries was "the means to achieve the common overriding objective of increasing the availability of less costly raw materials deriving from the sea-bed".[59] In order to neutralize the disagreement, he further said:

> I am convinced that we shall spend decades in fruitless dialogue if we continue to accept that the interests at this conference may naively be classified into two: those of the developed versus those of the developing countries. Neither group is without a diversity of concrete interests, given the factor of uneven development within. It is worse to maintain the posture of a confrontation between the few industrialized countries on the one hand and the proposed Authority or "mankind" on the other. 60

2. Towards a compromise solution, 1977-1980

Contrary to Engo's prediction, no efforts were made in the years to come to make a choice among those three options he had outlined.[61] Instead, other important issues such as transfer of technology, production control and financing the Enterprise became subject to negotiations. The pessimism about the result of the work of the First Committee which characterized the last days of the fifth session, led to the decision by the Conference to devote a substantial part of the sixth session in 1977 to the work of that committee. Some two months before the start of the work of the Conference, Jens Evensen, the chief delegate of Norway, took the initiative in leading an inter-sessional meeting in Geneva, where several new texts for Articles 22 and 23 (functions of the Authority) and point 9 of Annex I (rights and obligations under the contract) were produced.

When the Conference resumed its work in May 1977, there was some hope that these new texts could break the ice between the G77

and the industrialized countries. Evensen continued his efforts by leading the informal meetings of the Working Group of the First Committee. In the course of these negotiations, new revised texts about the above-mentioned articles were introduced by Evensen. These revisions - initially more in favour of the industrialized countries, but later modified to include the views of the majority in the G77 too - were not acceptable to either of these groups of states, yet they reinforced the optimism that a reasonable basis for the continuation of the negotiations and bridging the gap between the G77 and the industrialized countries was gradually coming into sight.[62] When the ICNT was introduced at the end of the sixth session, articles concerning the regime of the sea-bed, having numbers 133 to 192, were incorporated in Part XI of this document.[63] The text of Part XI, unlike the other parts of the ICNT, was not negotiated at the First Committee during the sixth session, but the Chairman of the Committee had personally prepared it on the basis of previous negotiations.[64] In this text several changes, particularly on those issues which had been dealt with by Evensen, and for which some basis for further negotiations had emerged, were introduced. These changes were generally incompatible with the texts suggested by Evensen, and, in comparison with the RSNT, Part XI of the ICNT considerably changed the balance in favour of the Group of 77. It was, therefore, natural that the industrialized countries sharply criticized the ICNT.[65]

A brief comparison between the related articles in the ISNT and the ICNT shows the grounds for the bitter reaction of the industrialized countries to the latter. As regards the right to exploitation, Article 151 of the ICNT (Article 22 of the RSNT)

provided for the Authority to carry out all activities in the Area. The Enterprise states parties and public or private companies could conduct the activities on behalf of the Authority.

The new element in this article was the indication that the contracts between the states parties or other entities and the Authority for conducting activities in the Area might provide for joint arrangements in accordance with Annex II, paragraph 5(i) and (j)(iii), both in the reserved areas for the Authority and non-reserved areas for the states parties or other entities.[66] This provision could be interpreted as subjecting the conclusion of a contract to the undertaking by the states and companies of entering into a joint arrangement with the Authority.[67]

Another new inclusion was the obligation of states or companies parties to a contract with the Authority under Article 15(2)(ii) to undertake "to contribute the technological capability, financial and other resources necessary to enable the Authority to fulfil its functions . . .". The question of transfer of technology in the ICNT was more than ever before emphasized. Certain provisions in Annex II of the ICNT could become bases of formally demanding an applicant to agree to the transfer of its technology to the Authority as a sine qua non for being granted a contract to conduct activities in the Area.[68]

Article 150(1)(g)(B) of the ICNT (Article 9 of the RSNT) dealt with the question of production limits. According to this article, the Authority should limit, in the first seven years of production, the total production of the minerals in such a manner that it did not exceed the projected cumulative growth segment of the world nickel demand.[69] After these seven years, the total production

should not exceed, on a yearly basis, 60 per cent of the cumulative growth segment of the world nickel demand. After these seven years, the total production should not exceed, on a yearly basis, 60 per cent of the cumulative growth segment of the world nickel demand. The introduction of a period of seven years was an innovation in comparison to the RSNT. Moreover, the length of the interim period, which was decided in the RSNT to be 20 years from 1 January 1980, was changed in the ICNT to begin on 1 January 1980 and should terminate on the day when such new "agreements ... in which all affected parties participate, enter into force".[70] The United States considered it as an artificial limit which is "far more stringent than would be necessary to protect specific developing country producers from possible adverse effects . . ."[71]

The question of the protection of the developing countries against the adverse effects of the sea-bed resources exploitation on their economies was particularly treated in Article 150(1)(g)(D), where the Assembly of the Authority was assigned to establish a system of compensation for the developing countries against a possible reduction in the price or the volume of the minerals exported, provided the reduction was caused by activities in the Area.

Another new item in this article was unrestricted power of the Authority to regulate even the production of minerals other than those derived from the nodules.[72] This widened the scope of the Authority's power to get closer to the definition of the developing countries for the common heritage of mankind. The inclusion of this provision was also criticized by the industrialized countries.

Finally, it is worth noting that, in another effort to realize the interpretation of the developing countries from the common heritage principle, Article 151(9) charged the Authority to establish a system for the equitable sharing of benefits derived from the activities in the Area, with regard to the needs of not only the states parties as in Article 9(6) of the RSNT, but also all developing countries and "countries which have not attained full independence or other self-governing status". This provision, though not challenged or criticized hard, was disliked by some industrialized countries.[73]

A new article in the ICNT was Article 153, which envisaged a review of the system of exploitation after 20 years from the entry into force of the Convention. The main objective of such a review was to establish whether during that period "a balance has been maintained between the areas reserved for the Authority and developing countries and the contract areas exploited by states, states entities, natural or juridical persons in association with the Authority".[74] In the event that any amendment in the system were deemed necessary, it should be ensured that the principle of the common heritage of mankind, the international regime for the equitable exploitation of the common heritage for the benefit of mankind and the Authority in order to conduct, organize and control activities, be maintained.[75] In the event of no agreement within five years to amend the provisions concerning the system of exploitation, "activities in the Area shall be carried out by the Authority through the Enterprise and through the joint ventures . . . provided however that the Authority shall exercise effective control over such activities".[76] The provisions of this article

were criticized by the technologically advanced countries on the ground that:

> It could seriously prejudice the likely long-term character of the international regime, by requiring that if agreement to the contrary is not reached within 25 years, the regime shall automatically be converted into a "unitary" system, ruling out direct access by contractors . . . 77

The industrialized countries feared an eventual disappearance of the Parallel System as a result of a review conference, in favour of joint arrangements under the control of the Authority.

Another important problem was the question of financing the Enterprise and the financial terms of the contracts for conducting activities in the Area. These questions, because of their complexity and the lack of reliable information based on detailed studies of different financial alternatives, were not comprehensively treated in previous sessions. Evensen, as part of his overall effort to provide compromise formulae for the most problematic issues relating to the sea-bed activities, touched upon the question of financing the Enterprise. In Evensen's proposal five sources for this purpose were named: 1- transfer of funds from the Authority which would have income from the contracts with the states and companies; 2- voluntary contributions from the states; 3- loans; 4- funds received from cooperation with others active on the deep sea-bed operations; 5- funds for covering the expenditures of the first project of the Enterprise through specifically envisaged payments by the states parties. Both alternatives 3 and 5 were the subject of controversy because they could involve many other problems such as the borrowing capacity of the Enterprise, deposition of securities for loans, the responsibility of each state party with a view to the repayment of the loans, the size of the

contribution of each state party to the first project of the Enterprise, etc.

As regards the financial terms of contracts for the activities in the Area, proposals were submitted by India and the United States during the first part of the sixth session. In both proposals, an application fee, a production levy and a profit tax were provided for. Moreover, the Indian proposal included a "charge to mine" which was supposed to be paid during the mining and in proportion to the quantity of nodules authorized to be mined.[78] What was included in Annex II, paragraph 7 of the ICNT, was principally based on the Indian proposal. It is worth mentioning that the financial arrangements still had in the sixth session a rudimentary character, and unlike other issues in the First Committee were not discussed thoroughly. The United States and some other technologically advanced countries rejected Part XI of the ICNT because of its positive pro-G77 character. It was clear at the end of the sixth session that, in order to continue a fruitful negotiation on the issues related to the sea-bed, it was imperative to take into consideration the interests of all countries in all major issues before the First Committee.

In the seventh session of the UNCLOS III, in the spring of 1978, as a result of a procedural decision, seven negotiating groups were established to deal with the 'hard-core' questions before the Conference Negotiating Group 6 dealt with the system of exploration and exploitation and resource policy. Negotiating Group 2 had on its agenda the important issue of the financial arrangements of the Authority and the Enterprise as well as the financial terms of the contracts for conducting activities in the Area.

Negotiating Group 1 produced new drafts for some of the most important articles relating to issues under its mandate. Article 151 of the ICNT, which provided for mining by states or private entities on behalf of the Authority, was reformulated to read "Activities in the Area shall be carried out as authorized or approved by the Authority . . ."[79] This change was a step closer to the concept of the Parallel System as contemplated by the industrialized countries.

The important question of technology transfer was also touched upon by Negotiating Group 1. The purpose of changes, in Annex II, paragraph 4(c)(ii) of the ICNT concerning the transfer of technology, was to require the applicant to undertake to negotiate with the Enterprise and to make available to the Enterprise, upon obtaining a contract, the technology he would use, on fair and reasonable commercial terms and conditions.[80] In other words, unlike the ICNT text, the conclusion of the contract with the Authority was not a precondition for the transfer of technology, but the applicant had an obligation to hold negotiations which should lead to such a transfer on the basis of fair business conditions being agreed upon. In case such negotiations did not lead to agreement, either party might refer the matter to conciliation and even further to arbitration.[81]

Another major question which was specifically negotiated in the second part of the seventh session, in summer 1978, was the basis for rejection of an application for a contract. The industrialized countries wanted to make sure that some specific conditions were enumerated in the Convention so, in the event an applicant met those conditions, he would be automatically granted a contract. The

G77, on the contrary, intended that the Authority should have broad competence to study each application, and could take its decisions according to requirements for each individual case. This question could not be settled in this session.[82]

The Negotiating Group 2 could easily reach a consensus on the question of financing the Enterprise through the texts presented by T. Koh, the Chairman of that group. The new texts contained the major part of Evensen's proposal from the year before. As regards the question of financial terms of the contract, the issue was more complicated. There were several elements which contributed to this complication. Due to the fact that no commercial exploitation had taken place by then, the negotiations had to be based on assumptions. Moreover, there were still several developing countries which were firmly against any form of parallel activities in the Area. The financial terms, therefore, could be totally different for them and others which supported the Parallel System. The changes in the ICNT during 1978 were certainly a turning point to make the text more acceptable to the technologically advanced countries which considered the changes in line with the recognition of the principle of untrammelled access of qualified applicants.[83] Nevertheless, the changes did not result in any revision of the ICNT in 1978.

The first revised version of the ICNT[84] was issued at the end of the first part of the eighth session in the spring of 1979. The revision of the ICNT was substantially based on the reports of the Chairmen of the three Committees and informal negotiations on them. As regards the sea-bed, the change in Article 151 of the ICNT, which in the revised text became Article 153, concerning the legal

relations between the states or private companies and the Authority in the case of conducting activities in the Area from "on behalf of" to "authorized by", suggested by Negotiating Group 1 in the previous session, was further revised to make it even more favourable to the industrialized countries. In the revised text, the states and private entities might conduct activities parallel and only "in association" with the Authority.[85] In other words, the activities of states or the companies are neither "on behalf of" the Authority - thereby rejecting the exclusive right of the Authority over the Area - nor "authorized by" the Authority - implying a denial of the discretionary power of the Authority in permitting the activities in the Area.

An important change, again in favour of the industrialized countries, was related to the terms of technology transfer. It was stipulated, in the revised text, that the commitment of the contract holder to make the technology available to the Enterprise "may be invoked only if the Enterprise finds that it is unable to obtain the same or equally efficient and useful technology on the open market and on fair and reasonable terms and conditions".[86] Thus, the obligation of the transfer of technology became a qualified one. Moreover, as was always insisted on by the industrialized countries, the technology was to be transferred only to the Enterprise and not to the developing countries, and the contents of paragraph 5(d)(iii) of the Annex II of the ICNT, which would suggest such a transfer to the developing countries, was dropped from the ICNT/Rev.1.[87]

A development concerning the question of access to the sea-bed was the change introduced in Article 6(3) of the Annex II to meet the demand of the industrialized countries in subjecting the refusal

to grant a contract to an applicant to four grounds specifically enumerated in the Convention.[88]

The question of financial arrangements was also extensively discussed in the eighth session. The industrialized countries generally criticized the text of Article 12 of Annex II of the ICNT/Rev.1 concerning the financial terms of the contracts. The changes introduced in the text prepared by the Working Group of 21 - which had been established the same year to deal informally with the controversial issues before the First Committee, and were later incorporated, with minor modifications, into the report of the Chairman of the First Committee - were intended to make the financial burden tolerable for the contractors while still safeguarding enough funds for the Enterprise to make it able to commence its own activities. Both the net proceeds tax and production charge were reduced in this new text and, in order to make the production charges of the single system proportionate to the taxes in the mixed system, even the former was reduced.[89]

The provisions concerning production control, which in the ICNT/Rev. 1 were treated separately under Article 151, were further modified. The interim period during which a production limitation was to be imposed was specifically defined to start five years prior to 1 January of the year in which the earliest commercial production was planned to commence under an approved plan of work. The interim period should last 25 years or until the end of the Review Conference or until the day new agreements between interested parties entered into force, whichever was earlier.[90] The production ceiling for any given year of the interim period was a combination of the total increase in annual nickel consumption for

five years before the start of the commercial production plus 60 per cent of the increase in nickel consumption between the year for which the production authorization was applied.[91] In this way, the resource policy provisions became even more restrictive in the ICNT/Rev.1.

With the will for compromise which was being shown from both the developing and developed countries in the eighth session, it was reasonable to expect that the remaining issues would soon be resolved. At this stage, it was clear that the developing countries were neither able nor willing any more to insist on their initial demands. The Parallel System of exploitation was generally accepted, and the main remaining question for these countries was to see how they could get the most out of the system; to protect themselves, as much as possible, from the adverse effects of sea-bed mining on their own economies; and to lay down, in the Convention, the foundations for access, even though qualified, to appropriate technology.

At the ninth session of the UNCLOS III in 1980, after further negotiations for more revisions to the ICNT were completed, the second revised text was issued at the end of the first part of this session.[92] The third revision of the ICNT, which turned this document into an informal text of the Draft Convention,[93] was issued a few days before the termination of the second part of the ninth session in 1980. In both these revisions more changes were introduced to get it close to the stand of the industrialized countries, and thereby command a consensus.[94]

The major change in provision concerning technology transfer was the introduction of a ten-year limit from the time the

Enterprise begins commercial production for demanding any contractor to transfer the technology to the Enterprise.[95] The industrialized countries intended to eliminate Article 5(1)(e) of Annex II in ICNT/Rev.1 [later 5(3)(e) of Annex III in the ICNT/Rev. 2 and 3] which required the contractor to transfer the technology to the developing countries conducting activities in the reserved areas, but they failed to do so. Instead, they made such a transfer conditional in the sense that such an obligation existed only if "technology has not been requested or transferred . . . to the Enterprise".[96] In brief, the modifications in provisions concerning technology transfer were meant to make the undertakings of the contractor more precise and binding, and at the same time to establish some limitations to these obligations in order to fit them into the realistic situation of the demands of the industrialized countries.[97]

There were some changes in provisions concerning the production limitations too. In order to minimize the fear of the industrialized countries concerning the adverse effects of the imposition of a production ceiling in times of low growth, a new paragraph was added to Article 151 which provided for the assumption of a minimum three per cent increase in nickel consumption, regardless of how low the real rate of growth was. This assumption was qualified by establishing that the ceiling did not for any given year exceed the total projected increase in nickel consumption.[98] Another innovation in this respect was the inclusion of paragraph (i) to Article 150. The purpose of this paragraph was to ensure the competitive capability of the land-based minerals with the minerals produced from the Area.[99]

The review of the exploitation system which was the subject of Article 155 of the revised versions of the ICNT went through some changes during the ninth session in 1980. These changes too were in favour of the industrialized countries. These countries were generally against the idea of a moratorium on the approval of new contracts in case no agreement could be reached in the Review Conference.[100] In the second and third revisions of the ICNT, the said moratorium was substituted by another provision according to which the Review Conference, in the event of failure to reach an agreement, might adopt, by a two-thirds majority, necessary amendments to the system, and submit them to the states parties. The amendments should enter into force for all states parties one year after being ratified or accepted by two-thirds of them.[101] These amendments should not affect the contracts already approved.[102]

The industrialized countries had reservations concerning the financial terms of the contracts as set forth in the ICNT/Rev. 1. The negotiations in this respect at the ninth session were based on the report of the Chairman of Negotiating Group 2 at the end of the eighth session. Some of the developed countries argued that the obligations of the contractor are many and therefore counter-productive. Another point of concern was the economic advantage that the Enterprise enjoyed in comparison with other miners. The industrialized countries believed that the Enterprise should make the same payments to the Authority as the others. The developing countries meant to exempt the Enterprise from such payments at least in the initial period until it became self-supporting.[103] The

compromise formula in the ICNT/Rev.3 put a ten-year limit to this initial period.[104]

At the end of the ninth session in August 1980 there seemed to exist consensus about most of the major issues related to the deep sea-bed activities. The core of this consensus was the Parallel System for exploration and exploitation of the resources of the deep sea-bed. In this system, the states parties or private entities sponsored by the states parties on the one side and the Enterprise or developing countries on the other, conducted activities in the non-reserved and reserved areas of the deep sea-bed respectively. The Enterprise was, according to the Draft Convention, guaranteed the necessary mining site, technology and capital to carry out its activities for an initial period. Article 8 of Annex III of the Draft Convention obligated each applicant for a contract to accommodate a total area or two separate areas which would allow two mining operations of equal estimated commercial value. The Authority would designate one of these areas as the site to be reserved solely for the Enterprise or the developing countries. In this way, the Enterprise was guaranteed access to the necessary sites without carrying out any prospecting activities. Each applicant was also required to transfer the technology he used to the Enterprise, provided that the technology was not available in the open market, and the applicant was legally entitled to transfer it. The obligation of technology transfer was limited to a period of ten years from the commencement of the commercial exploitation by the Enterprise.[105]

In order to give the Enterprise the chance to become financially strong and competitive with the other applicants,

Article 11(3) of Annex IV of the Draft Convention provided for the financing of the first mining activities of the Enterprise. According to this article, half of the necessary funds for such activities, i.e., exploitation, transport, processing and marketing of the metals, should be provided by all states parties in the form of long-term interest-free loans in accordance with the scale of assessments for the United Nations regular budget.[106] The other half should be raised by loans directly taken by the Enterprise from markets or international financial institutions, and debts incurred by the Enterprise in this way should be guaranteed by all states parties in accordance with the same scale.[107]

On the other side of the Parallel System, the states parties had received assurances that, in the event they were prepared to accept the duties set forth in the Draft Convention and abide by the regulations thereof, they would be guaranteed a contract by the Authority, and the cases where the granting of such contracts could be refused were very specifically enumerated in the Draft Convention. The contract so acquired could be cancelled only on specific grounds.[108]

The qualifications and commitments of applicants other than the Enterprise required by the Authority were contained in Annex III, Article 4 of the Draft Conventions. Apart from the nationality, control or sponsorship of the applicant,[109] the most important commitment of the applicant was formulated in Article 4(6)(a) of Annex III in the Draft Convention, which required the applicant to undertake:

> to accept as enforceable and comply with the applicable obligations created by the provisions of Part XI, rules and

regulations of the Authority, decisions of the organs of the Authority, and the terms of his contracts with the Authority.

The grounds for refusal of an application for contract, as we mentioned before,[110] were specified in Article 6(3) of Annex III of the Draft Convention. The refusal of the contract was therefore more or less beyond the discretion of the Authority, and if the application did not fall under one of the grounds listed in that article, and the applicant was prepared to comply with the commitments and assurances required by Article 4 of Annex III,[111] the Authority only on very specific grounds could refuse to grant a contract or suspend a contractor's rights. In the event, the exploitation by either the contractor or the Enterprise might, due to substantial evidence, cause serious harm to the marine environment in a particular area, the Council of the Authority could disapprove such exploitation in that area.[112] When the applicant received a contract, his rights under that contract might be suspended or terminated only in cases where:

> (a) in spite of warnings by the Authority, the contractor has conducted his activities in such a way as to result in serious, persistent and wilful violations of the fundamental terms of the contract, Part XI and the rules, regulations and procedures of the Authority or (b)the contractor has failed to comply with a final binding decision of the dispute settlement body applicable to him. 113

The Parallel System, which in 1980 won consensus with regard to the most important questions, i.e., transfer of technology, financial arrangements, review system and production policy, was in fact the result of a considerable compromise on the side of the developing countries and their interpretation of the principle of the common heritage of mankind. The major industrialized countries were apparently satisfied with the result of the negotiations,[114]

and hopes were expressed for the completion of the final text of the Convention in the following year.[115]

3. Return to opposition 1981-1982

The election of President Reagan in January 1981 was followed by a drastic change in the position of the United States. Just a few days before the tenth session of the Conference started its work, on 7 March 1981, the Reagan administration in fulfilment of one of the Republican Party platform plans concerning the law of the sea[116] and because of the pressure from the mining industry,[117] announced that the United States Government planned to carry out a thorough policy review concerning the negotiations at the Conference.[118] The American review lasted almost one year, and the position of the new administration became known in early 1982. The review contained fundamental changes concerning Part XI of the Draft Convention and those issues about which a consensus had been reached in August 1980, namely, access, the voting in the Council of the Authority, the production policy and the review system.[119] The demand of the United States to renegotiate these fundamental issues was unequivocally a reflection of the new economic policy adopted by the Reagan administration which did not admit of any restraint on economic activities and was subsumed under the laissez-faire principle.[120]

The suggested changes were, therefore, of such a character that they were totally unacceptable to the G77 and the socialist countries. Except for the financial arrangements, these changes would virtually return the status of the negotiations to where they

were in 1974. The negotiations in the final session of the Conference from 8 March to 30 April 1982, notwithstanding the intensive efforts of the President of the Conference and a group of 11 smaller industrialized countries[121] which made all efforts to mediate between the Group of 77 and the United States, did not result in the emergence of a text acceptable to all partners, and the United States requested a vote on the text before the Conference. The text of the Convention, which was in this way adopted, is principally the same as was embodied in the Draft Convention.

In order to accommodate a substantial part of the demands of the United States, the developing countries agreed to the adoption of a separate resolution originally submitted by the United States and the European countries concerning the protection of pioneer investments, i.e., safeguarding the rights of private consortia or public entities which had already made some investments in the exploration of the deep sea-bed.[122] This resolution endowed guaranteed automatic access to the deep sea-bed to the four mining consortia[123] and state-sponsored enterprises of Japan, France, India and the U.S.S.R. as well as developing countries or their enterprises which would spend, before 1 January 1985, a sum of $30 million in pioneer activities, and could register themselves by the Preparatory Commission as pioneer investors.[124] The private consortia were even ensured of getting priority in relation to other private entities in acquiring production authorization.

Other compromise steps taken by the developing countries were the allocation of one seat in the Council for the largest consumer of the minerals derived from the Area, i.e., the United States,[125]

the introduction of the same decision-making procedure for the Review Conference as the Conference itself, i.e., consensus,[126] and the change of the necessary majority for adopting and bringing into force the future amendments from two-thirds to three-fourths.[127]

The negative vote of the United States to the Convention after 14 years of active participation in the negotiations, and after getting very close to the consensus, together with the reluctance of some other industrialized countries such as the United Kingdom and the Federal Republic of Germany, in signing the Convention, left the future of the legal regime of the deep sea-bed subject to speculation. These three are potential sea-bed mining countries, and their participation would certainly contribute to the successful implementation of Part XI of the Convention.

The Preparatory Commission,[128] in waiting for the deposition of the 60th instrument of ratification of the Convention which puts it into force, has been dealing with the task of formulating the rules, regulations and procedures of the Authority and the International Tribunal for the Law of the Sea since 1983. During this time, some of the deep sea-bed mining states have, parallel with active participation in the work of the Preparatory Commission, enacted their own laws which permit private companies to commence the commercial exploitation of the deep sea-bed resources already, before the end of this decade.

SECTION III: THE PARALLEL SYSTEM IN THE CONVENTION

In order to analyze the exploitation system as laid down in the Convention, we have to first recall the objectives of the G77 and the industrialized countries as the main interest groups in the question of the sea-bed activities.

The G77 saw in the great wealth lying on the bottom of the deep sea a chance to correct the prevailing economic imbalance between the developing and the industrialized countries, which many members of the G77 believed to be an outcome of different aspects of colonialism, and hoped to be modified through concerted efforts for the establishment of a New International Economic Order. In order to realize such correction, two demands in the course of negotiations were essential: equal participation in the activities in the Area and preferential treatment to the needs and interests of the developing countries. Equal participation here did not mean equal right of participation but actual equality in terms of access to necessary technology and capital in order to be able to stand on the same footing as the potential sea-bed mining states. Preferential treatment meant the effect of activities in the area on the economy of the developing countries and the distribution of the resources and benefits derived from such activities.

Justice, from the viewpoint of the developing countries, was not any longer in impartiality and equality, but rather in partiality in favour of the weak against the strong, in favour of the poor as against the rich. It meant partiality to correct inequalities.[129] In order to restructure international relations

according to the necessities of the modern world, new definitions had to be given to old concepts such as equality.[130] Therefore, the developing countries, by introducing the concept of the common heritage of mankind, sought to give a concrete form to their assertions concerning the existence of a duty for the industrialized countries to compensate the unjust treatment of the past by recognizing the interests of the international community. The community interest or the benefit of mankind as the main aspect of the common heritage principle meant to the developing countries the closing of the gap between the industrialized states and the Third World by assisting the latter to get economically strong. For the G77, the only viable system for development of these objectives, as far as sea-bed resources were concerned, was the establishment of a supranational organization upon which all the rights to the Area were given. One can say that, in the shaping of the developing countries' policy towards sea-bed mining, ethical and moral considerations played a large role as an economic and political fact.

The position of the industrialized countries was to negotiate an agreement to incorporate the exploitation of sea-bed resources into the list of the freedoms of the high seas. As mentioned before, four freedoms were explicitly listed in Article 2 of the 1958 Convention on the High Seas.[131] Freedoms such as laying submarine cables and pipelines, scientific research or overflight have been practised by states before the drafting of the 1982 Convention. On the contrary, there was a problem with deep sea mining right. This problem stemmed from the fact that there was no state practice with respect to sea mining right when negotiations on

the UNCLOS III started. Because of the unexpected proposal of Malta to the General Assembly in 1967, the industrialized countries were in a way forced to sit at the negotiating table.[132]

Accepting the premise that there is an area outside the limits of national jurisdiction, they sought to establish a registry system for harmonizing the activities in that area and avoiding conflicts, but the main principle remained - the freedom of the high seas. When, in 1970, the industrialized countries accepted, through the unanimous adoption of Resolution 2749 (XXV) - Declaration of Principles - that the sea-bed and its resources were the common heritage of mankind, they in fact only undertook to pay a part of the benefits which would accrue to them as a result of the activities in the Area to the developing countries, but never repudiated the principle of the freedom of the high seas.

The principle of joint management of deep sea-bed resources by all states, through the Authority as suggested by the representatives of the developing countries, was impossible. To the developed countries, the benefit of mankind was best served through a liberal regime for the exploitation of the sea-bed resources which would admit of the increase of supply and the decrease of price for all. The de facto equality of states was not, in their view, necessarily to the benefit of mankind. These countries were not prepared to recognize the community interests as equal with each other or prior to national interests. Therefore, the part of the benefit they were prepared to pay to the developing countries had the nature of aid rather than a share. They identified the aspirations of the developing countries in regard to the deep sea-bed as "nothing less than a new socialist international economic order".[133]

For the industrialized countries, there existed two international issues: politically, it was important to have a guaranteed access to the sea-bed resources containing strategically important minerals; economically, it was expedient to provide the most advantageous business conditions for their nationals who had almost monopolized the necessary technology and were in possession of the required capital. Neither of these two issues permitted the industrialized countries to submit to the discretionary power of an international organization over which they had probably no decisive control. It was, as they saw it, illogical to contribute to the creation of a business competitor, and strengthen it through transfer of technology or capital. Subsequently, they could not agree either to the transfer of technology or capital or to the payment of tax to the Authority, considering the latter even at variance with the principle of sovereignty of states.

What came out of these two conflicting sets of objectives and expectations, two ideological controversies, was the Parallel System, according to which the Authority, through its operating arm, the Enterprise, on the one side, and the states parties or private entities, on the other, are entitled to exploit the resources of the sea-bed. It is our intention here to examine the Parallel System of the Convention. The main point of this examination is to see whether the interests of the developing countries versus the interests of the technologically advanced countries have been balanced under the Parallel System of the Convention. In fact, the latter fails to meet objectives for establishing a New International Economic Order through the application of a compensatory regime to a concrete situation of disparity. The Parallel System of the

Convention is more favourable to the industrialized countries' demand for unrestricted access to the sea-bed and its resources with some nominal and time-restricted undertakings.

The specific objective stated in the Convention for carrying out activities in the Area is:

> . . . to foster healthy development of the world economy and balance growth of international trade, and to promote international co-operation for the overall development of all countries, especially developing countries. 134

The furtherance of this objective is possible through, inter alia, transfer of technology to the developing countries for effective participation in the activities,[135] the promotion of the long-term equilibrium between supply and demand of the minerals derived both from the Area and from other resources,[136] and putting necessary limits on the minerals exploited from the Area in order to protect the developing countries from the adverse effects of such exploitation on their economies.[137] Thus, the Parallel System should be studied in the light of the said objective and the measures for its furtherance.

In order to realize such a comprehensive objective, the Convention prescribes that "Activities in the Area shall be organized, carried out and controlled by the Authority on behalf of mankind as a whole . . .,"[138] whereas the core of the Parallel System, Article 153(2) of the Convention, stipulates:

> 2. Activities in the Area shall be carried out . . .:
> (a) by the Enterprise, and
> (b) in association with the Authority by States Parties, or state enterprises or natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals when sponsored by such States, or any group of the foregoing which meets the requirements provided in this Part and in Annex III.

While the Convention has an extensive approach to include not only all the countries but even peoples who have not attained full independence or other self-governing status recognized by the United Nations in the term "mankind"[139] on whose behalf the Authority operates, it takes a restrictive attitude in qualifying those states or private entities which may conduct activities in the Area. Such an attitude is natural and comprehensible because even the compatibility of the Parallel System with the principle of the common heritage of mankind and "healthy development of the world economy and balanced growth of international trade", as enumerated in Article 150, is questionable. It should be borne in mind that the acceptance of that system by the developing countries was merely with regard to the fact that, without accommodating the demands of the potential deep sea-bed mining states and securing their participation, the International Sea-Bed Authority would exist only on paper. Therefore, the Convention has a consistent patent tendency to give, though sometimes unsuccessfully, the Authority, as the agent of mankind, a status superior to the states and private entities. The Convention explicitly confers all the rights relating to the Area and its resources on mankind as a whole on whose behalf the Authority shall act. The right of states and private entities to get access to the resources and explore and exploit them, according to Article 153(2)(b) of the Convention, should therefore be balanced with the right of the Authority in this respect. Moreover, since the Parallel System was proposed by the industrialized countries, and was reluctantly accepted by the Group of 77 in order to equip the Authority with the initial required technology and capital for carrying out the activities

independently, it could be expected, at least by the latter group, that when the Authority became a technologically independent entity, the role of the sea-bed mining states in deep sea-bed activities had to be revised. Therefore, it was felt that the Parallel System was eventually subject to revision. A closer scrutiny of the right of access,[140] the mechanism of balance and the question of the viability of the Parallel System is thus in order.

(a) The Right of Access

As the first and principal condition for containing the right of access, the states shall be parties to the Convention and other entities shall have the nationality or the sponsorship of states parties or be effectively controlled by them, and they shall "follow the procedures and meet the qualification standards set forth in the rules, regulations and procedures of the Authority" in order to qualify for the application of contract to conduct activities in the Area.[141] The Convention, moreover, specifies many criteria, both in Part XI and in Annex III, which constitute the framework for the activities of these entities inside the Parallel System. These criteria can be put into two broad categories: those qualifications which the applicant shall possess at the time of filing his application and those requirements which are in the form of obligations and incurred in relation to the application.

As regards the first category, the applicant should supply evidence testifying to his financial and technical capabilities as well as his satisfactory performance under any contracts with the

Authority.[142] In the case of the multinational consortia and potential sea-bed mining states, fulfilment of requirements concerning the financial and technological capabilities is a given fact, and even mentioning this requirement seems to be superfluous. It can be invoked, however, as a means of rejecting non-serious applicants.

In the second category of criteria, i.e., those which require undertakings by the applicant to act in a specific manner, a distinction should be made between the undertakings of a passive and those of an active nature. The clearest example of a passive undertaking of the applicant is his acceptance of the Authority's control of activities in the Area.[143] This provision, contrary to its convincingly authoritative appearance, has a restricted implication, and the control of the Authority here does not amount to extensive discretionary power. It simply means supervision to ensure compliance, which includes the right to inspect all operations.[144] The undertakings of an active nature are rather extensive and precisely formulated. They can also be divided into two groups: performance requirements on the one side and those undertakings which entail the applicant or the contractor to embark upon a certain positive act on the other.

Every applicant, according to Article 4(6)(a) of Annex III, should, as part of his application undertake:

> to accept as enforceable and comply with the applicable obligations created by the provisions of Part XI, the rules, regulations and procedures of the Authority, the decisions of the organs of the Authority and terms of his contracts with the Authority.

The general conduct of the applicant is even more precisely prescribed where it is required to "provide the Authority with a

written assurance" that his obligations under the contract will be fulfilled in good faith.[145]

Whereas the first category of requirements, i.e., qualifications which the applicant should possess at the time of application, and the first group of requirements in the second category, namely, those with a passive nature, and even those active undertakings governing the general conduct of the applicant, are non-controversial. The states which become parties to the Convention by virtue of submitting their sovereign rights in the resources of the Area to the Authority,[146] implicitly agree to at least a part of these undertakings, those requirements which require the applicant or the contractor to accomplish a certain positive act are controversial. It is mainly in these undertakings that one may notice the states or private entities as one side of the Parallel System are far or close to their initial objectives in deep sea-bed mining. One may put these positive acts into two groups: 1- technology transfer and 2- financial payments to the Authority.

(b) Technology Transfer

In reading the provisions of the Convention concerning technology transfer,[147] one should bear in mind that the prime objective is to facilitate "the access of the Enterprise and of the developing countries to the . . . technology [relating to activities in the Area] under fair and reasonable terms and conditions".[148] The duty of the applicant to comply with such a transfer of technology is emphasized in Article 4(6)(d) of Annex III. The main

condition for the Authority to invoke the technology transfer obligation is that the technology used by the contractor or equally efficient and useful technology is not available on the open market.[149] The applicant is required to undertake, upon submitting a plan of work, to make available to the Enterprise the technology which he uses in conducting activities and is legally entitled to transfer.

The transfer can occur through:

> licences or other appropriate arrangements which the contractor shall negotiate with the Enterprise and which shall be set forth in a specific agreement supplementary to the contract. 150

The transfer, nevertheless, is not self-executing, and the Authority should request it.[151] In the event the technology used by the contractor does not belong to him, and he is not legally authorized to transfer it to a third person, he has the obligation to either obtain a written assurance from the owner indicating that the owner is prepared to directly negotiate with the Enterprise for such a transfer under fair and reasonable commercial terms,[152] or he should, by means of an enforceable contract, acquire from the owner the legal right to transfer to the Enterprise the technology he uses if the Authority so requires.[153] In the latter case the acquisition of such legal right should not cause substantial cost to the contractor.[154]

The undertakings of the applicant for the transfer of technology, as set forth in Article 5(3) of Annex III, are subject to a time limit envisaged in paragraph 7 of the same article which states:

> The undertakings required by paragraph 3 shall be included in each contract for carrying out of activities in the Area until

10 years after the commencement of commercial production by the Enterprise, and may be invoked during that period.

Relating the beginning of the 10-year period to the commencement of commercial production by the Enterprise is due to the demands of the industrialized countries, which considered the Enterprise as a business competitor, to restrict the duty of transfer of technology to a limited period. Even though commercial production by the Enterprise may take some time to commence during which time at least a part of the contractors who are qualified as pioneer investors have the obligation to transfer the technology to the Enterprise or the developing countries,[155] the imposition of the time limit, in the event the Parallel System endures, may eventually lead to the supremacy of the technology of the private entities which have both the incentive and necessary resources to improve their techniques and acquire more effective methods over the technology possessed by the Enterprise, which needs to be competitive to survive.

Bearing in mind that the suggestion of the Parallel System by the industrialized countries was tied to the perception of the permanence of that system, it may be concluded that the restricted technology transfer was a foreseeable measure, even though some of these countries have declared the Convention provision in this respect to be unacceptable.[156] Such a transfer will occur during a defined period of time when those countries and their companies have, according to Resolution II governing preparatory investment, guaranteed access and the superior position of being already engaged in the activities. On the other hand, the developing countries wanted both an initial technology transfer which would enable the Enterprise and the developing countries to participate in the

activities, and the recognition of a right to technology which should be continuously transferred from the industrialized countries to the developing states in order to facilitate the establishment of a New International Economic Order. From this perspective, the technology transfer provisions in the Convention would meet a part of the initial objectives of the developing countries in this respect, whereas at the same time they accommodate the objective of the industrialized countries to limit this transfer to a defined short period.

(c) Financial Undertakings

The financial objectives of the Parallel System are multifold. The main goal is "to attract investment and technology to the exploration and exploitation of the Area" and "to ensure optimum revenues for the Authority from the proceeds of commercial production".[157] It is also prescribed that the Enterprise should be enabled to commence activities at the same time as the other entities.[158] To further these objectives, the Convention has laid down three sorts of charges for the contractor: fixed charges, charges based on the market value of the recovered resources and charges based on the profits.[159]

There is a fixed amount for the administrative cost of processing an application for approval of a plan of work which amounts to $500.00 per application.[160] Those entities which apply to the Preparatory Commission for the status of pioneer investors should pay half of the said amount at the time of filing their

application.[161] Each contractor shall pay an annual fixed fee of $1 million from the date of entry into force of the contract.[162] The contractor may cease to pay the annual fixed fee if the production charge, which is due from the time of commencement of the commercial production, is higher than $1 million. The production charge, which comes under the second category of charges, is calculated on the basis of a certain percentage of the market value of the processed metals produced from the polymetallic nodules recovered from the area covered by the contract. This percentage is 5 for the first ten years of commercial production and 12 for the rest of the contract's period.[163]

In order to fulfil the requirements of those industrialized countries which considered the payments of heavy production charges from the start of the activity as improper and counter-productive, the Convention has provided for a mixed system of payments containing a lower and different production charge and a part of net proceeds attributable only to the mining stage of activities.[164] In this system, the production charge is calculated differently and should be paid during two periods. The first period shall commence in the first accounting year of commercial production and terminates when the development costs,[165] as well as interest on the unrecovered portion thereof, are fully recovered by the contractors cash surplus, i.e., gross proceeds minus operating costs[166] and fees paid to the Authority.[167] The production charge in this period will be 2 per cent of the average market value of the processed metals.[168] The second period, in which the production charge is 4 per cent, shall commence in the year following the termination of the first period,[169] but if in any accounting year the payment of a

4 per cent production charge results in the fall of the return on investment below 15 per cent, the production charge shall be 2 per cent for that particular year.[170]

The payment from net proceeds occurs on an incremental schedule. From that portion of net proceeds which represents up to 10 per cent return on investment, the contractor shall pay to the Authority 35 per cent in the first period and 40 per cent in the second. This amount increases to 42.5 and 50 per cent for that portion of net proceeds which represents between 10 to 20 per cent return on investment. On the portion related to more than 20 per cent return, the contractor shall pay 50 and 70 per cent in the first and second period respectively.[171]

Considering the fact that the objective of the developing countries was to demand the maximum amounts of payments against leaving the potential sea-bed mining entities the right to appropriate portions of the common heritage of mankind and thereby securing the highest possible receipts for the Authority,[172] a glance at the above-mentioned provisions and a comparison with the original demands of the G77 shows how far these provisions are from that objective. For example, in 1977 India suggested that the production charge should include a flat-rate "royalty" of $5 per ton of nodules actually mined, and a "tax" of 20% of the revenue from the sale of processed metals derived from them.[173] The production charge was to be supplemented by a profit tax of 60 per cent on any net proceeds accruing after the contractor's return had exceeded 200 per cent of his investment.[174]

During the time negotiations concerning the financial arrangements were in process, the position of developing countries

in this respect became gradually weaker in the face of the pressing demands of the industrialized countries. This period, which lasted almost three years, is characterized by many setbacks for the developing countries. One example is the portion of the net proceeds attributed to the mining stage of the activities. The issue was raised with due regard to the fact that the nodules in their natural shape were not saleable and had to be processed into saleable products which could generate profits. In other words, the amount of the payments could not be ascertained before the recovered nodules had been transported and processed. The problem was how to levy payments on profits in these three different stages, which could, in many cases, be carried out by the same contractor.

The developing countries generally considered processing as an inseparable part of the activities, and therefore subject to the payment of charges to the Authority. On the other hand, the industrialized countries asserted the view that transportation and processing are not included in the activities in the Area,[175] and therefore are not subject to any payment. Because of the interrelation between the mining and processing stages, in cases where the contractor was engaged in both, determination of the profits accruing from the mining stage alone was not possible. The solution was to allocate an agreed artificial percentage of profits to the mining stage with due regard to the ratio of the investment costs in the mining sector to the total investment costs.[176] The determination of this percentage was necessarily disputed because there was a considerable difference of opinion concerning the amount of cost and the anticipated profits which should be attributed to each stage. The industrialized countries contended that only 20 per cent of the

value of finished metals produced from nodules could be attributed to the mining stage.[177] The estimate of the developing countries was 60 per cent. The Convention prescribes a minimum of 25 per cent,[178] and this is certainly not an exceptional case where a vital provision of the Convention reflects the position of the industrialized countries. For example, the "financial arrangement" did not appear on the list of subjects the Reagan administration sought to renegotiate in 1982.[179]

While fulfilling the requirements for getting a contract with the Authority to explore and exploit the Area, and in particular those requirements which presuppose the accomplishment of a positive act by the applicant, such as technology transfer, providing the Authority with a mine site and financial payment is a prerequisite for all those potential state or private sea-bed mining entities which in future, after entry into force of the Convention, intend to embark upon activities in the Area. Those public or private enterprises which have been active in this field, and will be the actual miners for many years to come, have, according to Resolution II of the Conference, both guaranteed access as pioneer investors and priority to others, except the Enterprise, in getting production authorization.[180]

The industrialized countries have secured, for at least the next half century,[181] unrestricted access to the Area and its resources against the obligation of a time-limited technology transfer and modest financial payments to the Authority. Bearing in mind that this guaranteed access, at least for the near future, is limited to the states or private entities of a few industrialized countries against more than one hundred developing countries, one

may wonder if the Parallel System and, in particular, the adoption of Resolution II, quite contrary to the objectives set for the activities in the Area,[182] would not provide preferential treatment for those countries which possess sea-bed mining technology and the necessary capital.

(d) The Balance of Rights

Approval of the Parallel System by the Conference implied the recognition of the right of states parties to the Convention and their enterprises to embark upon the activities in the Area parallel with the Enterprise and those developing countries which intended to conduct activities in association with the Authority. Although the right of the states parties in this respect is strictly defined and under the control of the Authority, the acceptance of that system could virtually place a great number of the developing countries and the Enterprise in an inferior position against a few strong, experienced business-oriented states or private enterprises. In order to challenge this inequality and obtain a balance, the Convention has provided for two sets of measures: those aiming at restricting the rights of states and private entities in regard to deep sea mining, and those which are meant to give preferential treatment to the Authority and the developing countries. It is, therefore, appropriate to study these two sets of measures separately.

1. Restrictive measures

The most significant provision of the Convention which restricts the rights of states, either industrialized or developing, as well as natural or juridical persons to the deep sea-bed, is Article 137(3), according to which any claim or exercise of right in the Area should be in accordance with the Convention. In this article the term state is employed in an unqualified fashion to demonstrate that the restriction is not limited to the states parties but applies to all states.

The premise in the Parallel System is that the states parties have already agreed that conducting activities outside the framework of the Convention is incompatible with customary international law. Some other specific restrictions are, therefore, imposed in the Convention upon those state enterprises or private activities which have the nationality of a state party,[183] and intend to carry out activities in the Area. The first example of restriction imposed upon industrialized countries is found in Article 151(9) of the Convention which reads:

> The Authority shall have the power to limit the level of production of minerals from the Area, other than minerals from polymetallic nodules, under such conditions and applying such methods as may be appropriate by adopting regulations in accordance with article 161, paragraph 8 [procedure of decision-making at the Council].

This Article has empowered the Authority to establish restrictions even on the production of minerals other than those derived from the nodules. Although the procedure for the imposition of such a restriction is not articulated in the Convention and is dependent on the adoption of necessary regulations by the Authority, a glance at

Article 1 of Annex III, which should be read together with Article 12(4) of Annex IV, reveals the preferential treatment which is accorded to the Enterprise as an agency identified with the interests of the developing countries. Whereas the title to the minerals from the deep sea-bed shall pass upon recovery in accordance with the Convention,[184] it is only the Enterprise which has explicitly obtained the mandate of having title to all minerals and processed substances produced by it.[185] The Convention is silent about the rights of states or private entities to title over deep sea minerals other than those derived from nodules.[186] Although this restriction is related to minerals not subject to the regulations of the Convention, it fits well into the overall balance that the Convention aims to establish.

The second most notable example of restriction aiming at limiting the rights of public or private deep sea mining entities in favour of the Enterprise and developing countries are the production restrictions enunciated in Article 151. One of the declared objectives of such restrictions is to protect:

> developing countries from adverse effects on their economies or their export earnings resulting from a reduction in the price of an affected mineral, or in the volume of exports of that mineral, to the extent that such reduction is caused by activities in the Area. 187

Such concern for the adverse effects of the deep sea mining on the economies of the developing countries is limited to an "interim period".[188] In this interim period, which normally lasts between 20 and 25 years from the 1st of January of the year in which the earliest commercial production is planned to commence under an approved plan of work,[189] the operator who has an approved plan of work may not commence commercial production unless he has

applied and received a production authorization.[190] The operator shall specify in his application the annual quantity of nickel he expects to recover under the approved plan of work, and the production authorization for that quantity shall be issued by the Authority unless the sum of that quantity and the quantities already authorized exceeds the nickel production ceiling in the year the authorization is going to be issued.[191] The method of determination of the production ceiling is detailed in Article 151(4).[192]

The obligation of the operator to apply for a production authorization separately from his approved plan of work, and the discretion of the Authority to refuse such an application in order to keep within the production ceiling imposed by the Convention, is limited to a specifically defined and restricted interim period. What will eventually happen to this restriction depends on the outcome of the Review Conference but one can discern an intention in the Convention to impose time limits whenever it concerns measures to protect the interests or enhance the benefits of the developing countries. Production policies and transfer of technology are two examples.

2. Preferential treatment

To further the objectives arising from the common heritage principle and to provide for an equitable exploitation of the resources of the deep sea-bed as embodied in the fourth preambular paragraph of the Convention, the Enterprise and the developing countries have received preferential treatment in many articles of that instrument. The preferential treatment is meant to give them

a de facto equal status with the industrialized countries in the field which would otherwise be dominated by the technology and capital of the latter. In order to defeat those criticisms which are aimed at this preferential treatment on the ground that it is contradictory to the concept of mankind which embraces all countries and the equitable exploitation which requires taking into consideration the interests of all states, the Convention, inspired by the view of the developing countries and their interpretation of the term "equitable"[193] has legalized the preferential treatment for the developing countries in Article 152(2), and sanctioned it as non-discriminatory.[194]

As regards the keeping of balance in the Parallel System, the developing countries enjoy preferential treatment either directly or through the Authority. The most illustrative example is the sharing of benefits derived from activities in the Area. The Authority shall provide for such sharing on an equitable and non-discriminatory basis,[195] but this, as we have seen, means having regard to the needs of the developing countries. Article 160(2)(f)(1) of the Convention, therefore, defines this function of the Authority more precisely, and binds the equitable "sharing of financial and other economic benefits derived from activities in the Area" to the "taking into particular consideration the interests and needs of developing states and peoples who have not attained full independence or other self-governing status". Whereas this preferential treatment concerns all developing countries and peoples who have not attained full independence against industrialized countries, in another article the Convention aims to favour a group of the developing countries. This relates to those countries in

this group which "suffer serious adverse effects on their export earnings or economies resulting from a reduction in the price of an affected mineral or in the volume of exports of that mineral, to the extent that such reduction is caused by activities in the Area".[196] According to Article 151(10) of the Convention, "the Assembly shall establish a system of compensation or take other measures of economic adjustment assistance including cooperation with specialized agencies and other international organizations to assist developing countries . . ." The reason why the contents of Article 151(10) should be considered as preferential treatment is that the adverse effect of deep sea-bed activities is not limited to the economies of the developing countries. Some industrialized countries, e.g., Canada, would also suffer from such activities, but the article is silent about them. Nevertheless, the last sentence in this article, which states "The Authority on request shall initiate studies on the problems of those states which are likely to be most seriously affected with a view to minimizing their difficulties and assisting them in their economic adjustment" may be construed as referring to all states suffering from adverse effects of sea-bed mining on their economies.

While Article 151 on production policies with provisions on production limitation is specifically concerned with the production of nickel and was a restrictive measure, the compensation clause in the last paragraph of that article is a preferential treatment for those developing countries which would suffer from the production of other minerals derived from polymetallic nodules, namely, cobalt, copper and manganese. Since the Authority may, as a party to a commodity agreement, undertake obligations concerning production

limitations in relation to one or more of these minerals, such limitations constitute a compensatory measure favouring the land-based producers and thereby a preferential treatment against technologically advanced countries.

The main objective of the production policies set out in the Convention "is to promote the growth, efficiency and stability of markets for those commodities produced from the minerals derived from the Area, at prices remunerative to producers and fair to consumers".[197] As a measure for obtaining balance in the Parallel System and furthering the said objective, the Convention has accorded to the Authority:

> the right to participate in any commodity conference dealing with those commodities and in which all interested parties including both producers and consumers participate. The Authority shall have the right to become a party to any arrangement or agreement resulting from such conferences. 198

Since participation of the Authority in such commodity agreements is with regard to all production in the Area and not only that part relating to the Enterprise or developing countries, it, in fact, treats the latter preferentially in order to secure an equitable and harmonized production policy.

Bearing in mind that conducting activities in the Area requires a huge investment, the Convention seeks to obtain the necessary equilibrium of the Parallel System by ensuring the financing of the Enterprise's operations. In addition to the general obligation of states parties to "support applications by the Enterprise for loans on capital market and from international financial institutions",[199] the Convention takes into special account the possibility of the Enterprise conducting activities on one mine site - the first one -

and transporting, processing and marketing the minerals recovered therefrom in order, inter alia, to meet its initial administrative expenses. To provide the Enterprise with the necessary funds for this initial activity:

> All states parties shall make available to the Enterprise an amount equivalent to one half of the [required] funds . . . by way of long-term interest-free loans in accordance with the scale of assessments for the United Nations regular budget . . . Debts incurred by the Enterprise in raising the other half of the funds shall be guaranteed by all states parties in accordance with the same scale. 200

Since this obligation of making interest-free loans to the Enterprise by all states parties is to be fulfilled in accordance with the scale of assessment from the United Nations regular budget, it is expected that the major part of the loan will be provided by those technologically advanced countries which become parties to the Convention. In this instance, the Enterprise receives preferential treatment against the other competitors, i.e., the public or private entities of the industrialized countries, because it is assured of the necessary capital for the completion of the first generation activities. The obligations of states parties to make available the necessary funds to the Enterprise is even repeated in Resolution II concerning protection of pioneer investors. The certifying states,[201] according to this resolution, shall "ensure that the necessary funds are made available to the Enterprise in a timely manner in accordance with the Convention, upon its entry into force".[202]

In an effort to make the Enterprise self-supporting, the Convention requires the Assembly to exempt the Enterprise from financial payments to the Authority during the first ten years from the commencement of commercial production by it.[203] Recalling the

payments of a contractor to the Authority, including application registration fee, annual fixed fee, production charge and share of net proceeds, one will note that the Enterprise, at least for a limited time, is treated preferentially.

The Convention not only provides for the preferential treatment to the Enterprise as an effective measure to make it competitive with other entities active in the Parallel System, but also recommends that states parties on whose territories the Enterprise holds property and assets should provide special incentives, rights, privileges and immunities to the Enterprise.[204] Although the formulation of the relevant article of the Convention is "State parties may provide special incentives . . ." to show that providing these rights, privileges and immunities to the Enterprise is not obligatory for the states parties and the article has a more recommendatory than obligatory nature, it does not fail to repeat that, in the event such preferential treatment is given to the Enterprise, there is no obligation for the states parties to accord the same treatment to other commercial entities.[205] Nevertheless, if the states parties accord rights, privileges and immunities to entities conducting commercial activities in their territories, they have the obligation to provide the same to the Enterprise.[206]

With regard to these measures, which are taken by the Convention to compensate the inferior technological capability and financial possibilities of the developing countries against the industrialized states, and to correct a situation of disparity by according to one side preferential treatment to the detriment of the other side, one may point out that, although the relevant provisions set out in the Convention are satisfactory, they are insufficient

to further the original objective of the Parallel System which is obtaining a balance between the rights and duties of the states and other entities on the one hand and those of the Authority on the other.

Exemption of payments to the Authority for ten years, e.g., is an appropriate preferential measure, but bearing in mind that the payment of any sort of charges by the Enterprise to the Authority as set out in Article 10(1) of Annex IV in the Convention is contradictory to the concept of the common heritage of mankind and the function of the Authority as its administrator, the reasonable choice would have been an unlimited exemption of the Enterprise from any sort of payment to the Authority. The financing of the Enterprise's operation in one mine-site is a preferential measure contributing to its becoming self-supporting, but there is a duty for any state more important than making the Enterprise self-supporting: the duty to keep the Authority and the Enterprise functioning effectively, and for that there should not be any time limit.

It should not be forgotten that the multinational consortia, acting as business entities, all have the necessary incentives and possibilities to act effectively. In order to obtain a real balance between them and the Enterprise, which may as a sort of international organization lack those incentives and suffer from all the usual deficiencies of such an organization, it is important to ensure genuine viable preferential measures for it, and thereby secure the furtherance of the main objective which is to foster healthy development of the world economy and balanced growth of international trade.

(e) The Review Conference

The revision of the Parallel System after a certain period of time was a sine qua non for the developing countries in order to accept that system.[207] This was partly because they were accepting something which had not yet been tried in practice, and partly because the system per se was perceived to be contradictory to the idea of joint management of the common heritage of mankind. On the other hand, for the industrialized countries, the acceptance of other obligations such as technology transfer and financial payments to the Authority was dependent on the acquisition of a guaranteed right to the Area and its resources. The review provision laid down in Article 155 of the Convention seeks to accommodate a compromise.[208]

The review of the Parallel System shall be carried out by a conference which the Assembly convenes for this purpose 15 years after the 1st of January of the year in which the earliest commercial production commences under an approved plan of work.[209] The choice of 15 years is due to the assumption that the first generation exploitation of deep sea resources will be completed during that period, and the result of the working of the system could be evaluated then. The specific objectives set out for the Review Conference are to establish, inter alia, whether the exploitation system has achieved its aims, including the development of the resources of the Area for the benefit of mankind as a whole, equitable sharing of benefits derived from activities in the Area, prevention of monopolization and effective and balanced management

of reserve areas.[210] The Conference, therefore, shall consider both the conduct and the results of the system.[211]

Few provisions concerning activities in the Area are to be maintained regardless of the result of the work of the Review Conference. At the top of the list of these provisions is the principle of the common heritage of mankind and the ensuing principle of equitable exploitation of the resources of the Area for the benefit of mankind, with particular consideration to the interests of the developing countries by an Authority which shall organize, conduct and control activities in the Area.[212]

As regards the right of access of states to the Area, no clear and specific reference is made in Article 155(2), but it requires the Review Conference to ensure the maintenance of " . . . the rights of states and their general conduct in relation to the Area, and their participation in activities in the Area in conformity with this Convention . . .". One may, of course, interpret it as referring to the right of participation of states in the activities in the Area according to Article 153(2)(1), but it may similarly be construed as referring to the rights of states under Article 11 of Annex III of the Convention concerning joint arrangements with the Enterprise where the activities are totally controlled by the Authority. Moreover, Article 155(2) does not exclude state or private enterprises from the scope of the Review Conference, which may put in question the future role of these entities within the Parallel System. As far as this system is concerned, it can be pointed out that the Review Conference has a rather broad mandate, and even if states and public or private entities continue to enjoy the right of access to the Area, "the possibility cannot be

precluded that the result [of the broad authority given to the Review Conference] will be abolishment of direct access for private investors".[213]

The decisions concerning modifications in the provisions related to the exploitation system are to be taken by consensus and recourse to voting should not be taken unless all efforts for commanding consensus have been exhausted.[214] If during five years the Review Conference cannot agree on amendments to the exploitation system, it may adopt those amendments, within the ensuing 12 months, by a three-fourths majority, and they will enter into force for all states parties 12 months after the ratification or accession of three-fourths of states parties.[215] Through this procedure, as Dupuy has rightly observed: "a real legislative power is entrusted to the Review Conference by means of a majority vote machinery which should bestow on developing countries the power of the last word".[216] Whatever the amendments may be, the Convention ensures that the rights acquired under existing contracts shall not be affected.[217] This security of tenure accorded to the contractor is based on provisions contained in Article 153(6) and Article 18(1) of Annex III.[218]

The outcome of the Review Conference is difficult to foresee, and depends very much on the degree of success of the Parallel System during its first decade of operation. The Review Conference, due to its mandate in Article 155(1) and (2) and the decision-making procedure which puts the developing countries in a position to amend the exploitation system through their own majority, is the only component element of the Parallel System which may be applied to correct the system in a way that, even if the states and public or

private entities retain their right of access on one side of the system, the Enterprise will be accorded the extra rights, privileges and exemption of duties so that it can in effect play its superior role as the operating arm of the agent of mankind.

SECTION IV: GENERAL ASPECTS OF DOMESTIC LEGISLATION RELATED TO EXPLOITATION SYSTEM

Parallel with the work of the Sea-Bed Committee, the mining industry of the United States initiated efforts to have the Congress enact legislation under which the commercial exploitation of the resources of the sea-bed could become feasible. In 1980, President Carter signed the Deep Sea-Bed Hard Mineral Resources Act. As a consequence of the enactment of domestic law for deep sea-bed mining in the United States, several other industrialized countries followed suit. They are: the Federal Republic of Germany (1980), the United Kingdom (1981), France (1981), Japan (1982) and Italy (1985). The Soviet Union also issued a law in this respect in 1982.[219]

A crucial point of concern for these countries was to ensure that the licences issued under national laws be honoured by other deep sea mining powers, and activities sanctioned by these statutes be harmonized in such a way that no conflict of interests would arise. There are, therefore, provisions in these laws, except in that of the Soviet Union, which provide for the recognition of other deep sea-bed mining countries as "reciprocating states", if

firstly, their respective laws are not substantially different from each other, and secondly, they recognize each other's mining licences.[220]

Besides a clear indication in these statutes as to the designation of other deep sea mining states as "reciprocating states", some efforts have been made to establish a multilateral arrangement for the coordination of the mining activities of these countries on the sea-bed. The first of these efforts was the conclusion in 1982 of the Agreement Concerning Interim Arrangement Relating to Polymetallic Nodules of the Deep Seabed (popularly known as Reciprocating States Agreement (RSA) between France, the Federal Republic of Germany, the United Kingdom and the United States).[221] The nature of this Agreement violates Article 137(3) of the 1982 Convention which provides that: "no state or natural or juridical person shall claim, acquire or exercise rights with respect to the minerals recovered from the Area except in accordance with this Part [Part XI of the Convention]. Otherwise, no such claim, acquisition or exercise of such rights shall be recognized".[222] The main purpose was to "facilitate the identification and resolution of conflicts which may arise" over areas for which the multinational consortia had applied for mining licences prior to that Agreement.[223]

In order to justify the legality of the Agreement and its compatibility with the Convention and the aspirations of the Conference, reference was made, in the second and third preambular paragraphs, to the interim character of the national law of the respective parties concerning deep sea-bed mining and the fact that the Conference, through Resolution II, had authorized the protection

of the preparatory investments in deep sea mining prior to the entry into force of the Convention.[224] The Agreement, however, did not contain firm operational commitments, and limited itself to "encouraging the voluntary resolution of overlapping claims among the pioneer mining consortia".[225]

These efforts continued in the years to come, and in August 1984, an agreement was reached among the so-called "like-minded" group of states, comprising the United States, the United Kingdom, the Federal Republic of Germany, France, Italy, Japan, Belgium and The Netherlands, in the form of a Provisional Understanding Regarding Deep Seabed Matters.[226] The Provisional Understanding, is inconsistent with the UN Convention and Resolution 11 relating to pioneer investment. This is because it goes beyond the resolution of conflicts arising from overlapping claims, by including provisions regarding exploration and exploitation of the seabed resources outside of the LOS Convention. Additional Western industrialized states, such as Belgium and the Netherlands, may possibly follow and enact legislation for deep sea-bed mining. The purpose of the Provisional Understanding is to coordinate the issuing of authorizations in respect of applications for deep sea exploration and exploitation among virtually all potential deep sea mining states of the West, and particularly to ensure the recognition by all these states of the agreements reached by the major consortia in 1983 concerning the coordinates of the areas of deep sea-bed claimed by each of them.[227]

Since the basis of these agreements is to respect the claims made under the provisions of the national laws of any of the parties

to the agreement, and thereby provide for the legal security which is an inherent feature of any domestic law, it is essential to examine these laws. We shall first dwell upon the study of the general features of these instruments and their legal bases. After a comparative study of their contents, the question of the compatibility of such laws with existing international law shall be discussed.

(a) Definitions

A common aspect of these laws is that they all give their own definitions of the sea-bed. According to the American law, deep sea-bed means the sea-bed and subsoil thereof to a depth of ten metres, lying seaward of and outside the continental shelf of any nation or outside any area of national jurisdiction beyond the continental shelf of a nation provided such jurisdiction is recognized by the United States.[228] According to the British Act, the sea-bed is that part of the bed of the high seas, the right to the resources of which is neither exercisable by the United Kingdom nor by any other sovereign power.[229] The German Act treats this question more generally by defining the sea-bed as the part of the sea-bed and its immediate subsoil outside the areas over which the Federal Republic claims sovereign rights or recognizes the sovereign rights of other states.[230] The French and Italian laws have similar formulations for the definition of the sea-bed. In both cases, they refer to the area of the sea-bed and subsoil beyond the limits of national jurisdiction "in accordance with international

law".[231] The Soviet law is similar to the American law in that it defines the sea-bed as areas beyond the limits of the continental shelf, but it does not offer any definition of the latter.[232] The Japanese law, like the British Act, defines the sea-bed as the bed and subsoil of that part of the high seas over the resources of which no state has jurisdiction for exploration.[233]

Except for the French and the Italian definitions, which are somehow close to the definition of the sea-bed in the Convention, the rest are ambiguous.

(b) Declared Goals

The other common feature of the national laws is their declared goals, which are substantially different from each other. While for the United States the major objective is "to regulate the exploration for and commercial recovery of hard mineral resources of the deep seabed by the United States citizens pending the conclusion of a comprehensive law of the sea treaty in force in respect of the United States",[234] the British Act chooses a prohibitive formulation for declaring the purpose. The implied objective is to prohibit persons to whom the Act applies from exploring for or exploiting of the hard mineral resources of the deep sea-bed unless they have been granted a licence under the Act.[235] The purpose of the German Act is "to regulate provisionally and to promote the exploration for and the recovery of mineral resources from the deep sea-bed until the entry into force of an international agreement for the Federal Republic of Germany".[236] The common objective of these three

countries, inter alia, is "to ensure non-discriminatory access for their nationals to sea-bed resources, thus providing secure access to supplies of minerals in the national interests".[237]

Although not expressly stated, the purpose of the French law seems to be setting out conditions under which the French Republic grants authorizations for the exploration and exploitation of "mineral" resources to natural persons and corporate bodies of French nationality pending the entry into force of an international convention to which France would be a party.[238] Almost the same formulation is used in the Italian law.[239] The Japanese law which, except for its title, generally gives the impression that it has a permanent rather than interim character, defines its purposes as establishing:

> interim measures necessary for regulating business activity in deep sea-bed mining so as to contribute to the promotion and extension of the public welfare through the rational development of deep seabed mineral resources and in keeping with the recent, rapid strides of international society toward a new order of the sea and other significant changes in the international environment surrounding deep seabed mining. 240

Unlike the other national laws, the Soviet law gives the impression that, because of the enactment of national law by other states, and in order to protect the Soviet interests with respect to the exploration and exploitation of the mineral resources of the deep sea-bed, the Soviet Union was reluctantly obliged to take measures.[241]

As is clear from the declared or implied purposes of these documents, the main objective is to protect national interests by ensuring a safe and undisputed access to the mineral resources of the deep sea-bed. The interests of the international community have obviously no place in the stated objectives. Some of the supporters

of these laws have tried to signify the provisions contained in some of them for the protection of the marine environment as a tribute to the international community,[242] while such provisions may be as much to the interest of the enacting states as to the rest of the world.

(c) Legal Bases

As regards the legal bases of these laws, they all seek to repeat that the acts are temporary measures pending the entry into force of the Convention for the enacting states; and, moreover, these measures are consistent with the regime of deep sea-bed mining as developed in the Conference.

Since almost all the enacting states, at the time of the adoption of their national laws, were actively participating in the negotiations of the Conference or the Preparatory Commission, it would have been self-defeating if the law had not had an interim character. The clear indication of their interim nature in the titles of these laws or their preambular paragraphs is to be regarded as a commitment of these states to the results of the eventual entry into force of the Convention.[243] Nevertheless, neither this commitment nor the other provisions of the said legislations suggest the exact duration of the interim period since it all depends on the yet uncertain date of the entry into force of the Convention and the eventual allegiance of these states or some of them to it. McDade, with reference to the indeterminate duration of the national legislation and the possible conflicts which may arise due to the delay in the entry into force of the

Convention and the issuing of exploitation licences under domestic laws, concludes that unilateral legislation of the industrialized countries is not indicative of wholehearted support for the Convention.[244]

The main argument in defence of compatibility of these domestic laws with the sea regime of the Convention is that the enacting states do not claim any sovereignty over the sea-bed or its resources. This is consistent with Article 137(1) of the Convention which states:

> No state shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor shall any state or natural or juridical persons appropriate any part thereof. No such claim or exercise of sovereignty or sovereign rights nor such appropriation shall be recognized.

It should be noted that the disclaimer of sovereignty in these acts is not uniform. The legislation of the United States and the Federal Republic of Germany and the Soviet law disclaims sovereign rights over both the deep sea-bed and its resources.[245] The Japanese and Italian laws confine themselves to disclaiming sovereign rights over the deep sea-bed only.[246] The British Act is silent on this point.

Without rehearsing here the usual arguments about the inseparability of claims to the sea-bed from those to the resources thereof, one may point out the contradiction which exists between such a disclaimer and the conferring of exclusive rights by the states upon the applicant for exploration or exploitation licences. One of the representatives of the United States to the Conference, in a personal effort to justify the enactment of national laws, wrote:

> No state argued that it could confer a right on its nationals to mine a specific site that would be exclusive erga omenes . . . no state asserted a right to claim a part or even a "reasonable" part of the deep seabeds or the resources of the deep seabeds to the exclusion of others pending a treaty, or to the exclusion of a treaty. 247

The related provisions in the American Act reaffirm this position by stating that the United States "does not . . . assert sovereignty or sovereign or exclusive rights or jurisdiction over, or the ownership of, any areas or resources in the deep seabed".[248] Nevertheless, Section 102(3) of the same act provides that:

> a permit [for commercial recovery] recognizes the right of the holder to recover hard mineral resources, and to own, transport, use, and sell hard mineral resources recovered, under the permit and in accordance with the requirements of this Act.

Biggs, with regard to this contradiction, observes that: "The rights to recover, own, take away, use, and sell only pertain to someone with exclusive and absolute ownership over something". He further concludes that: "if diplomatic protection is granted to ensure the full exercise of such mineral rights, it is the equivalent of asserting of public extraterritoriality ...".[249] In this context, reference should be made to Article 137(3) of the Convention which says: "No state or natural or juridical persons shall claim, acquire or exercise rights with respect to the minerals recovered from the Area except in accordance with this Part".

As a matter of fact, it is worth mentioning here that in all the acts, reference is made, explicitly or implicitly, to the deep sea-bed activities as a freedom of the high seas. The most explicit example is paragraph 12 of Section 2 of the American Act which says:

> . . . That exploration for and commercial recovery of hard mineral resources of the deep seabed are freedoms of the high

seas subject to a duty of reasonable regard to the interests of other states in their exercise of those and other freedoms recognized by general principles of international law.

The formulation of section 1(1) of the German Act implies that deep sea mining remains a freedom of the high seas until the entering into force of the Convention for that country. The British Act and French and Italian laws have similar formulations in this respect. Nevertheless, O'Connell, with reference to his doctrine of relativity of the freedom of the high seas,[250] argues that "where it is generally thought acceptable that states should insist upon certain conduct on or over the high seas, the abstract freedom of the seas will not stand in the way".[251]

The adoption of the Declaration of Principles without any negative vote and the signing of the Convention by the majority of the states of the world are, in our opinion, evidence of the general acceptance that the conduct of states in the use of the deep sea-bed and its mineral resources cannot be governed by the principle of the freedom of the high seas.

The asserted legal bases of the national law for deep sea-bed mining, i.e., their interim nature, disclaimer of sovereignty compatibility with the Convention, and emanation from the principle of the freedom of the high seas can hardly hold in the face of the approval of the Declaration of Principles by the enacting states, their active participation in the Conference and their repeated commitment to the establishment of an international regime for the deep sea-bed as a result of the negotiation at the Conference.

SECTION V: RIGHTS AND DUTIES UNDER DOMESTIC LEGISLATION

The exploitation system of the sea-bed, as laid down in the national legislation, has, as far as general features are concerned, some similarity with the regime set out in Part XI of the Convention. In this legislation, the scope of activities, the subjects of laws, size and number of mine sites, the authority which issues the licences and the degree of its discretion, and the obligation of the contractor are prescribed either in general terms, as in the case of the Soviet Union and France, or in comprehensive and detailed fashion, as in the case of the United States. We shall touch upon these general elements of the system of exploitation under domestic laws.

(a) Range of Activities

These laws generally regulate two aspects of deep sea mining activities, namely, exploration and exploitation, but the latter may find, in these laws, a new and broader definition in comparison with the Convention. The American law, for instance, prefers the term "commercial recovery" to "exploitation", and defines it as not only recovering hard mineral resources, but also processing them at sea, and disposing of any waste resulting from such activity at sea.[252] The British Act, though not specifically including the processing or disposal of waste in the definition of "exploitation", empowers the Secretary of State, as the administrator of the law, to put the

necessary terms in respect of the subsequent activities in the exploitation licence if he thinks fit.[253] In the German Act, "recovery" is used in place of "exploitation", and it implies the removal of mineral resources for commercial use, and "processing thereof, if carried out at sea".[254] The French law, while employing the term "exploitation" to denote "extraction of mineral resources for commercial purposes",[255] does not include subsequent activities in this definition. The Soviet law does not provide any definition for "exploration" or "exploitation" of the deep sea mineral resources. The Japanese law, like the American and German Acts, prefers "recovery" to "exploitation" and, without specifying processing or disposing of wastes, points out that "recovery" contains some subsidiary activities which include sorting, refining, etc.[256] The definition of "exploitation" in the Italian law is almost the same as in the French law.[257]

In order to avoid complications resulting from this disparity in definitions, the Provisional Understanding signed by the enacting states has adopted the expression "deep seabed operations" rather than "exploitation" to imply all operations, other than prospecting, in relation to the hard mineral resources. They all divide the whole of the operation into two aspects of exploration and exploitation, for each of which a separate licence or permit is required. The licences give exclusive rights to the holder against any subject of the state which has issued the licence and the entities under the jurisdiction of a reciprocating state.[258]

In some of these laws, like that of the United States, the holder of the exploration licence is more or less automatically entitled to the exploitation permit,[259] while in other cases,

such as the French law, in order to obtain an exploitation permit, the applicant should give proof, during the period of the validity of the exploration permit, that the exploitation is in fact possible.[260]

(b) Subjects of Legislation

All these domestic laws aim to regulate, in the first place, the activities of their own subjects in relation to deep sea mining, but by virtue of conferring exclusive rights on their own nationals and including provisions in respect of reciprocating states practice in their own national law, they may even influence the behaviour of others rather than their own subjects.

The purpose of the American law is to regulate deep sea mining by United States citizens, who are defined as:

> (A) any individual who is a citizen of the United States;
> (B) any corporation, partnership, joint venture, association, or other entity organized or existing under the laws of any of the United States;
> (C) any corporation, partnership, joint venture, association or other entity (whether organized or existing under the laws of any of the United States or a foreign nation) if the controlling interest in such entity is held by an individual or entity described in subparagraph (A) or (B). 261

Such a provision is not included in other documents, but with respect to the overall provisions of these instruments, it is clear that none of them provides for the operation of the companies under licences issued by a non-reciprocating state.

The French, Italian and German laws are equally simple in their definition of the subject of law. Except for the choice of the word "resident" in the German law instead of "national" in the

other two, all three stipulate that permits may be issued only to their own subjects, and all three confer the right to their subjects to operate under the permits issued by a reciprocating state.[262] The British Act is more detailed in this respect, and is to be applied not only to the citizens of the United Kingdom and colonies, but also any resident thereof.[263] The application of the Act may extend, by Order in Council, to citizens of the United Kingdom and colonies resident outside the United Kingdom or resident in any country specified in the Order.[264]

The Japanese law is precise when it confines itself to the nationals or corporations of Japan, and recognizes the rights of the Japanese nationals who have entered into a partnership relation with the nationals or corporations of a reciprocating state.[265] The Soviet law, being the act of a country with a centrally planned economy, has the Soviet "enterprises" as its subjects.[266]

Although the Soviet Union does not recognize the reciprocity mechanism as envisaged in other national laws, paragraph 3 of the law provides for Soviet "co-operation" with those states which recognize the permits issued to Soviet enterprises for exploration and exploitation of deep sea-bed resources. This paragraph and the term "co-operation" leave the option open for the Soviet Union, in the event the Convention does not enter into force for that country, to settle its differences with the multinational consortia without becoming a party to the Reciprocating States Agreement or similar arrangements. The Soviet enterprises are entitled, according to paragraph 7 of the law, to engage in the activities carried on by the foreign entities and vice versa, but this permission is qualified by the condition that there should exist a treaty between

the Soviet Union and the interested state of which the foreign entity is a subject. This paragraph can be invoked as a basis for the eventual accession of the Soviet Union to the Reciprocating States Agreement or the Provisional Understanding, but with regard to the sharp contradiction of ideology and economic system of the Soviet Union and the Western states, it is possible that the interested states referred to in paragraph 7 are those with the same economic system as that of the Soviet Union.

As regards the subjects of the national law for deep sea-bed mining, one may sum up by saying that the primary purpose of all these laws is to provide legal security for their own nationals operating either independently or as a part of an international consortium. In the latter case, some of these laws , such as those of the United States and Japan, apparently go further, and try to extend their applicability in cases where they deem their subjects have a "controlling interest".

(c) Size of Mine Sites

Another relevant question is the size and number of the mine sites each applicant may obtain. With the exception of the British Act, which has no specific indication to the size of the area, the rest of the instruments contain explicit references to that issue. The applicant has the right to suggest the size of the area of the sea-bed for which he applies, but the issuing of permission is dependent on the fact that the suggested area has reasonable limits and the interests of other states are taken into account.[267]

According to both the American and the German Acts, the area suggested by the applicant should be large enough to ensure the permit holder of sufficient commercial recovery during the entire period of the permit.[268] The decision about the size of the area, according to Article 12(2) of the Japanese law, is to be in accordance with the Ministry of International Trade and Industry Ordinance. The administrative decision, here, may be constructed as a means of ensuring the size of the area of the Japanese applicant does not exceed reasonable limits and the interests of other states in that area. There is no statutory limitation in any of these laws on the number of permits which may be allocated to any applicant. One reason for such a uniformity in avoidance of anti-monopoly provisions is that imposition of any restriction in the number of sites for one state would place the entities of that state at a disadvantage in comparison with entities operating under other national legislation.[269]

(d) Similarities with the Provisions of the Convention

Insertion of provisions for financial and technological capabilities of the applicant, and reasonableness of the size of the site in national law, are all efforts to bring the contents of these laws closer to the requirements of Part XI of the Convention. Thus the Soviet law in paragraph 4 requires the applicant for an exploitation permit to specify, in their application, two areas, one of which

> shall be subject to use by the enterprise which has received a permit, and the other shall be reserved for possible exploration and exploitation by a future international organization for the seabed.

The French law is not so explicit, and without mentioning the International Sea-Bed Authority, it decrees that "the exploitation permit shall be valid for an area not exceeding half of the area of the exploration permit".[270]

Two of the main features of the exploitation system as established in the Convention, namely, transfer of technology and production control, are absent in the national laws. The American Act, in Section 110, dealing with conservation of natural resources, envisages that each licence or permit issued shall contain:

> terms, conditions, and restrictions which have due regard for the prevention of waste and the future opportunity for the commercial recovery of the unrecovered balance of hard mineral resources in the area to which the licence or permit applies.

The Soviet law pays lip service to the requirement of technology transfer by pronouncing that:

> . . . competent agencies of the USSR shall effectuate cooperation on the basis of international treaties of the USSR with interested foreign states for the purpose of rendering assistance to them in the development of technology, in the production of equipment, in implementing measures to prevent pollution of the environment, the training of the cadres, and other questions connected with the exploration and exploitation of mineral resources of seabed areas. 271

Such assistance to other states for the development of their deep sea mining technology is conditioned to the existence of a treaty between the Soviet Union and the interested state.

Since the raison d'etre of national law for deep sea mining is to avoid the burdensome provisions of Part XI of the Convention, and facilitate the conducting of activities in a free market climate, mere reference to provisions similar to those of the Convention

seems to be an unsuccessful effort to demonstrate the consistency of these laws with the Convention.

(e) Financial Terms

Before closing this section, mention should be made of the financial terms of the national laws.

Due to the fact that the major consortia which are engaged in deep sea mining comprise companies from several different countries, the favourable financial terms in the law of any of those countries could lead to the preference of that law by the consortia, and that would make the realization of any effective reciprocating states arrangement improbable. Thus, it was inevitable that under all these laws more or less similar financial obligations would be prescribed for the permit holder.

The American, British, French and Italian laws of deep sea mining all impose tax of 3.75 per cent of the value of the unprocessed nodules.[272] The German Act charges the holder of a permit to pay an annual fee of "0.75 per cent of the average market price in that particular year for the metals and minerals in their simple commercial processing forms which are recovered from the mineral resources mined".[273] As the price of the minerals contained in the nodules is estimated to be approximately 20 per cent of the unprocessed nodules, the amount of the German tax seems to be more or less equal to the 3.75 per cent tax on the value of unprocessed nodules.[274] The British Act, as an equal alternative to 3.75 per cent tax, Section 9(1)(b) imposes a tax of 0.75 per cent

of the value of any metals found in the nodules, but unlike the German Act, the time period on the basis of which the tax is to be calculated is not specified. The Soviet law is not explicit in this respect, and without mentioning any specific figure, provides for the allocation of a "part of the assets received from the exploitation by Soviet enterprises of mineral resources of seabed areas" to a special fund.[275] The Japanese law does not contain any provisions relating to financial terms, and the determination of such terms is delegated to Cabinet Order.[276]

One of the principal pieces of evidence offered as support for the claim of compatibility of the national law with the Convention has been the existence of provisions in those laws for the establishment of a revenue sharing fund which shall distribute the proceeds of deep sea mining among the members of the international community.[277] This contention has been made particularly by the pioneering enacting states, namely, the United States, the United Kingdom and the Federal Republic of Germany.

Section 2(b)(2) of the American law pronounces the establishment of such a fund as one of the purposes of the law, and section 403 of the same law establishes the "Deep Seabed Revenue Sharing Fund", and provides for the transfer of the taxes received as a result of deep sea mining to that Fund.[278] Since the tax imposed by the Act shall be paid only until the date when an international deep sea-bed treaty - adopted by the UNCLOS III or otherwise - takes effect with respect to the United States, or until ten years after the enactment of the legislation, i.e. 1990,[279] the Fund may have two destinies: either an international deep sea-bed mining treaty shall be ratified by the United States before 1990 - and

currently this seems improbable - in which case the amounts in the Fund shall be available for making contributions to the international community under that treaty, or in the absence of such a treaty for the United States, the Congress may decide on the application of the Fund.[280] Section 10 of the British law contains similar provisions concerning the establishment of a "Deep Sea Mining Fund". In both cases, the commitment of sharing the proceeds of deep sea-bed mining with the international community shall cease to exist in the event no international deep sea-bed mining treaty enters into force for these states within ten years of the date of the coming into force of their own acts.

The German law is rather brief in this respect. Section 13 of the act envisages the establishment of a trust fund to be transferred "to the international Sea-Bed Authority after the entering into force of an international agreement on deep seabed mining for the Federal Republic of Germany. Up to that time the trust fund shall be invested for foreign aid purposes". The Italian law adopts a similar position. Although the establishment of a fund is not envisaged, Article 15 of the law clearly states that the revenues from the tax imposed on deep sea mining shall be used for the purposes of the Italian aid to the developing countries.

The Soviet law sets forth the provision for the establishment of a special fund from part of the assets received from deep sea mining by the Soviet enterprises. The assets of the fund may be transferred to a future international organization for the sea-bed in order to fulfil the obligations of the USSR according to a new convention on the law of the sea.[281]

Finally, it should be recalled that the Japanese law not only leaves financial terms to the designation of the Cabinet, but also lacks provisions for the establishment of any fund or arrangement for sharing the proceeds of deep sea mining with the international community.

To sum up, it may be concluded that, because of the inevitability of providing legal security for the licence holders against any claims by the subjects of other potential deep sea-bed mining states, the national laws contain more or less similar provisions, which in itself has facilitated the establishment of the Reciprocating States Agreement. Although attempts have been made to justify the provisions of these domestic laws as evidence of their compatibility with Part XI of the Convention, the comparison of our study in this section and the system of exploitation of the deep sea-bed under the Convention shows that there cannot be any similarity in the contents of the provisions of the national law and those of the Convention, because enactment of such law is per se in conflict with the purposes of the Convention and aspirations attached to the principle of the common heritage of mankind.

SECTION VI: DOMESTIC LEGISLATION AND EXISTING INTERNATIONAL LAW

So far, domestic legislation has been enacted by seven states which actively participated in the negotiations for the establishment of a legal regime for the deep sea-bed through the

Convention. It is, therefore, natural for any observer to wonder whether this active participation and commitment to the completion of the work of the Conference would not entail any obligation on the part of these states to refrain from enacting such laws which are evidently in conflict with the purposes of the Convention. In other words, it is not merely the question of rights and obligations of a non-party to the Convention, but the duties incurred by voting for the Declaration of Principles and recognizing the principle of the common heritage of mankind as enshrined in that declaration, making numerous statements in support of the efforts inside the Conference for the establishment of a universally acceptable legal regime on the one hand, and the compatibility of the national legislation with these duties on the other. We shall try to discuss, in brief, the rights and obligations of non-parties to the Convention, and later elaborate the arguments furnished in support of any claim of compatibility of national laws for deep sea mining with international law.

It is generally agreed that the Roman law doctrine pacta tertiis nec nocent nec prosunt - agreements neither impose obligations nor confer rights on third parties - which is a general concept of contract law, prevails as regards the relation between the non-party states and those who are parties to a treaty.[282] The same vow is articulated in Article 34 of the Vienna Convention on the Law of Treaties,[283] which reads: "A treaty does not create either obligations or rights for a third state without its consent". There are two exceptions to this rule: (a) general acceptance of a treaty provision as declaratory of customary international law in which case the custom, quite independent of the treaty, entails

rights and duties for third states, and (b) the existence of the intent of the parties to the treaty to establish rights and duties for third states.

While there is, it seems, not much controversy about the first exception, and the requirement of proof for the existence of a rule of customary international law is placed on the one who wishes to benefit from a right or impose an obligation, there are some differences of opinion about the interpretation of Articles 35 and 36 of the Vienna Convention, which contain the requirement of "intention".

Conferment of rights on third states is stipulated in Article 36, which reads:

> 1- A right arises for a third state from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third state, or to a group of states to which it belongs, or to all states, and the third state assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.
> 2- A state exercising a right in accordance with paragraph 1 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty.

The best example of the conferment of right on the third states are the treaties concerning the major international water-ways such as Article 380 of the 1919 Treaty of Versailles dealing with the Kiel Canal.[284]

The establishment of the intent of the parties to the treaty comes from several factors. If the third states are not specifically named in the treaty, the legislative history, voting on pertinent proposals and statements of the parties at the time of signature or ratification of the treaty, plays a decisive role.[285]

While in the case of "rights" the Vienna Convention presumes the assent of the third states unless the contrary is indicated, Article 35 of the same Convention, dealing with the duties of the third states, makes the imposition of any "obligation" contingent upon the acceptance, in writing, by the third state of that obligation.[286] The requirement of a written acceptance of the third party, in this case, decreases the significance of the "intent" factor of the third state.[287]

In discussions about rights and obligations for third states, mention has been made of so-called "law-making" or constitutive "treaties" as distinct from "contractual" treaties.[288] The law-making treaties, it is assumed, intend to lay down law where none existed before, or introduce regulations which constitute a change in law, and as such do not confine themselves only to the parties. The Hague Conventions of 1899 and 1907, the Convention on the High Seas, the Outer Space Treaty and the Nuclear Test-Ban Treaty, are examples of law-making treaties often mentioned.[289] O'Connell holds the view that rights and duties acquired by a third state from such treaties are not derived from the treaty and its legislative character, but are due to the fact that the provisions contained in the treaty have transformed into customary rule through passage from the treaty into the general corpus of international law.[290]

Irrespective of the type of treaties - contractual or legislative - one may take account of certain treaties that intend to lay down a set of rights and obligations valid erga omnes.[291] The usual examples are treaties concerning international entities, such as the United Nations. This position has been confirmed by the ICJ in its advisory opinion on Reparation for Injuries Suffered

in the Service of the United Nations Case,[292] where the court expressed the view that:

> . . . fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone, together with capacity to bring international claims. 293

The most illustrative example of treaty provisions which contain obligations valid erga omnes is paragraph 6 of Article 2 of the Charter of the United Nations, which states:

> The organization shall ensure that States which are not Members of the United Nations act in accordance with these principles [described in other paragraphs of the same Article] so far as may be necessary for the maintenance of international peace and security.

Lauterpacht considers it as a mandatory provision which "constitutes a claim to regulate the conduct of non-members to the extent required for the fulfilment of the object of that Article".[294] Nevertheless, those who reject any inherent capacity in treaties to confer rights or impose obligations on third states argue that those provisions adverted to in Article 2 of the Charter as applicable to non-member states are those which are obligatory upon all states, independently of the Charter, such as the principle of peaceful settlement of disputes and that of abstention from the threat or use of force against the territorial integrity or political independence of any state.[295]

One may summarize the discussion by concluding that, irrespective of the type of treaty, and in addition to factors such as the language, the statements of the parties, diplomatic correspondence, etc., the decisive factor for the extension of the rights and duties to the third state is the consent of that state. The

sole exception to this rule is when the treaty provision has acquired the status of a customary rule of international law. Both proponents and opponents of national law for deep sea mining have based their claims on this exception and argument.

Before we embark on analysing the arguments for or against the compatibility of national law with existing international law, it is useful to point out two of the outstanding features of the Convention which have some influence on such an analysis.

The first of these features is its universal character. As a significant document dealing with all issues relating to the law of the sea, and in order to contribute to the maintenance of peace, justice and progress for all peoples of the world,[296] it has been time and again emphasized that the Convention should be "a product of universal consensus and compromise among nations from every political, economic and social system on this globe".[297] In other words, it has been meant to produce a universal law, applicable to all nations. The participation of virtually all the states of the world, members or non-members of the United Nations, self-governing territories and states and associated states, in the work of the Conference is to be regarded as a sign of universality and uniqueness of the Convention.[298] From this point of view, i.e., universality, the Convention is an unprecedented legal instrument.[299] The extent of the issues covered by it, the length of the time which has been spent on drafting it directly by the representatives of almost all of the states of the world and the significance of its subject endow a sui generis character on its universal act. Therefore, it may be inappropriate to make use only of the standard norms of the law of treaties for the interpretation

of the rights and duties of the parties or the third states in respect to the Convention, particularly the overall participation of almost all states in its drafting. It may be even fitting to reconsider the definition of "third states" in relation to the Convention.

Another feature of the Convention which is in fact the basis of its universality is its compact nature as a "package" which makes it impossible for any individual state to select a part of it and reject the rest, unless the selected part is overwhelmingly recognized as declaratory of an existing customary international law. In connection with this significant quality of the Convention, the view has been expressed that:

> Its quality as a package is a result of the singularity of the circumstances from which it emerged, which factors included the close interrelationship of the many different issues involved, the large number of participating states, and the vast number of often conflicting interests which frequently cut across the traditional lines of negotiation by region . . . [it] necessitated that every individual provision of the text be weighed within the context of the whole, producing an intricately balanced text to provide a basis for universality. 300

Engo, the representative of Cameroon to the Conference, speaking about the consequence of the "package" quality of the Convention, said:

> Individual states may not pick and choose to be bound by convenient aspects of its provisions. This is particularly true for any who may to wish to reject one or more of its 17 parts, selecting only certain rights established under the rest of the Convention. 301

Having dealt with two of the significant features of the Convention, namely, universality and package quality, which makes it distinct from other international conventions, we will now embark on analyzing the arguments of the industrialized countries with deep

sea-bed mining laws about the rights that they assert to enjoy from the provisions of the Convention, and the absence of obligations to refrain from adopting the national laws.

As mentioned before, assertion of rights derived from the provisions of the Convention by the states with national law is based on the designation of those provisions as declaratory of customary law. Such assertions became usual after it had become clear that some of the technologically advanced countries might not sign the Convention. The position of these countries, otherwise, had always been in favour of beneficial rights as a result of ratifying the Convention. The statement of the American representative to the Sea-Bed Committee in August 1972 reveals this position. He maintained:

> . . . his delegation was of the opinion that only the countries which were prepared to ratify or accede to that new treaty should benefit from the advantages which were to be derived from its implementation. 302

As a response to the assertion of rights on the basis of transformation of the Convention provisions into customary law, Nandan, the delegate of Fiji, in the Final Session of the Conference, said:

> . . . each chapter of the Convention is an integral part of the whole. To attempt to rationalize that parts of the Convention are simply customary international law, and thereby to separate them from others, is to ignore the fact that what was customary international law has been clarified or modified and that, if such provisions were preserved, it was done as a quid pro quo for other provisions. Any selective use of the Convention, therefore, will be not only inappropriate but also unacceptable. 303

This categorical statement notwithstanding, we believe that, as long as the provisions are the codification or restatement of the law which existed prior to the adoption of the Convention and they are recognized as such, the third states may assume rights

or obligations in regard to that particular rule. But since a considerable part of the Convention is in fact a progressive development of the law, it is imperative, in each case, to establish whether that particular provision has acquired the status of customary law. It is conceivable that, apart from the criteria set out by the ICJ for the transformation of a treaty provision into customary law,[304] because of the package quality of the Convention, such provisions may become customary law only if they are accepted and applied by the overwhelming majority of states. The regime of the EEZ is an example.[305] This concept, although novel and a part of the package deal as a whole, did not have the same sensitive status in upholding the balance of interests as, for example, the right of transit passage.

The right of "transit passage" is one of those rights that the great maritime powers have sought to enjoy while staying outside the Convention. According to the American delegate to the final session of the Conference:

> . . . those parts of the Convention dealing with navigation and overflight and most other provisions of the Convention serve the interests of the international community. These texts reflect prevailing international practice. 306

The concept of "transit passage" through straits used for international navigation, as embodied in Part III of the Convention, is a new concept which means continuous and expeditious passage of all ships and aircraft, military as well as commercial, through, under, or over straits which connect one part of the high seas or an EEZ to another part of the high seas or an EEZ overlapped by the territorial seas, without prior notification to or authorization from states bordering straits.[307] The introduction of this new

concept into the Convention is the result of an effort to bring about a balance between interests which would be otherwise disturbed by the extension of the breadth of territorial sea.

The rights contained in the transit passage provisions are crucial for the free navigation and overflight of maritime powers. President Reagan, in a statement on 10 March 1983 in connection with the proclamation on the the U.S. exclusive economic zone, stated that:

> . . . the United States will exercise and assert its navigation and overflight rights and freedoms on a worldwide basis in a manner that is consistent with the balance of interests reflected in the convention. The United States will not, however, acquiesce in unilateral acts of other States designed to restrict the rights and freedoms of the international community in navigation and overflight and other related high seas uses. 308

While approval of the transit passage regime by all states was a sine qua non for major maritime powers to agree on the extension of the territorial sea to 12 miles, for the members of the G77, which border most of the straits used for international navigation, the conferment of transit passage rights on the major powers was a quid pro quo for the acceptance by those powers of the regime of deep sea-bed mining as incorporated in Part XI of the Convention. Moreover, the consensus concerning the extension of the breadth of the territorial sea had already prevailed in the early stages of the Conference, whereas the reluctant acceptance of the transit passage regime by the G77 was simultaneous with the progress in formulating the Parallel System of exploration and exploitation. The question now is, assuming that Article 3 of the Convention governing the breadth of the territorial sea has transformed into customary law - not only because of the consensus which existed in the Conference on

this point but also with regard to the practice of states, which is evidence of such a development[309] - can it be claimed that transit passage, like the EEZ and protection of the marine environment, has passed into the corpus of international law? The answer, in our opinion, should be in the affirmative, but it should immediately be added that its status as customary law is qualified by its function as a weight in a very delicate balance of interests. It may not be invoked unless all closely related interests are recognized. We share the opinion of Anand, who believes that:

> freedom of unimpeded navigation through straits and archipelagic waters territorialized by extended maritime zones, as provided in the Convention, has become part of customary international law . . . 310

The continuous opposition of some strait states such as Spain, Morocco, Oman, Iran and Yemen notwithstanding,[311] the close connection between extended territorial sea which seems to have acquired the status of a customary law and the regime of the transit passage may render it necessary to recognize the latter as declaratory of customary international law. In other words, in the case of two closely related rights, as such a state cannot enjoy one right as having emanated from custom and reject the other for its being conventional. The balance of interests which is the predominant attribute of the "package deal" necessitates the recognition of this concept as customary law.

What remains for those Western Powers which have doubts about becoming parties to the Convention is to realize that benefiting from rights derived from the Convention, if they appertain to provisions which are the result of a delicate balance of interests sustained in other specific provisions, is permissible only when

rights and duties contained in related provisions are duly recognized. Any claim of transit right, therefore, entails the duty for the third states of recognizing the right of all coastal states to extend the breadth of their territorial sea to 12 miles on the one hand, and recognizing Part XI of the Convention and the regime of deep sea mining as another end of the balance on the other.

After discussing "transit passage" as an example of rights which may be claimed by a third state on the basis of transformation of the related provision in the Convention into what we may call qualified customary law, the obligation of third states to refrain from actions which defeat the purposes of the Convention, with particular regard to the adoption of national legislation, requires closer examination. The obligation burdened on non-party states to refrain from acts inconsistent with the provisions of the Convention derives, inter alia, from the universal character of the latter, and the obvious intention of its prospective parties, which constitute a considerable majority of the states, to establish rules valid erga omnes.[312]

Invocation of the principle of consent may not be of much help to justify the position of the minority dissenting states. National laws for deep sea mining are contradictory to the purposes of the most significant principle enshrined in the Convention, namely, the common heritage of mankind. This principle, which was universally recognized as governing the sea-bed and subsoil beyond the limits of national jurisdiction and the resources thereof by the adoption of the Declaration of Principles in 1970 and Charter of the Economic Rights and Duties of States in 1974, has acquired, as a result of

state practice both in and outside the United Nations, the status of a general principle of international law. The common heritage principle does not admit of any legal regime for deep sea-bed mining unless it is "established with the consent of the international community as the sole representative of mankind and in conformity with the system determined by the international community".[313]

Because of the lack of constant protest and, on the contrary, the active participation in the drafting of rules which have given concrete legal implication to the common heritage principle, the argument of the industrialized countries in defence of their laws may not be sustained. The common heritage of mankind, if not jus cogens, has been, in fact, consolidated as general international law, and the industrialized countries have, in fact, cooperated wholeheartedly for this consolidation,[314] and if the final result does not meet all their expectations, they may not revoke the obligation they have incurred through the passage of that concept into a general principle of international law.

Some of the states with national laws for deep sea mining, in an effort to justify their claims of free navigation and overflight and the enactment of the national law as an exercise of the freedom of the high seas, have asserted that these rights are derived from the existing international law of the sea. The Federal Republic of Germany, for example, believes that:

> As a matter of law, States cannot be subject to obligations under the Convention until it has been duly ratified and has entered into force for them. Pending such entry into force, States may validly rely on and are bound by all rules of the law of the sea as developed by the generally recognized practice of States or as contained in relevant Conventions already in force. 315

"Conventions already in force", referred to in the preceding passage, are the 1958 Geneva Conventions on the law of the sea. As regards the relation of these instruments to the 1982 Convention, there were some countries in the Conference which supported the idea that the new Convention should supersede the 1958 Convention erga omnes.[316] The explanation was in the procedure which had been adopted for the drafting of the Convention. Nevertheless, the Conference preferred the more traditional practice and laid down in Article 311(1) of the Convention, that: "This Convention shall prevail, as between States Parties, over the Geneva Conventions on the Law of the Sea of 29 April 1958". Such provision, anyhow, may not justify the adoption of national legislation for deep sea mining by the states which do not intend to become parties to the Convention, because deep sea mining is a novel use of the sea which is not regulated by the 1958 Conventions, and far-fetched interpretations of the provisions of those conventions can hardly provide for any legal basis for such unilateral acts.[317]

Four out of seven states with national law for deep sea mining, namely, France, the Soviet Union, Japan and Italy, have signed the Convention, and two other signatories, i.e., Netherlands and Belgium, have been long considering enacting similar law.[318] These states - those which both have national laws and have signed the Convention - have acquired a special provisional status against the Convention.

Their conduct prior to the entry into force of the Convention is regulated by Article 18 of the Vienna Convention on the Law of Treaties, according to which each state "is obliged to refrain from acts which would defeat the object and purpose of the treaty . . .

until it shall have made its intention clear not to become party to the treaty". Regardless of which of these states are parties to the Vienna Convention, Article 18 of that Convention is generally considered as declaratory of customary international law, and as such is binding upon all states.[319]

Although the Convention has not allocated a specific article to the definition of the "object and purpose" of Part XI, it is not difficult to establish such object or purpose by pointing to several provisions such as the one in Article 153(1) which states: "Activities [of exploration and exploitation] in the Area shall be organized, carried out and controlled by the Authority on behalf of mankind as a whole . . .".[320] Provisions like this or the one incorporated in Article 137(3), which says: "No State or national or juridical person shall claim, acquire or exercise rights with respect to the minerals recovered from the Area except in accordance with this Part", reveal the fact the enactment of national law for deep sea mining is at variance with the purpose of Part XI of the Convention.

Acting either as a signatory to the Convention contrary to the obligations imposed on a state because of Article 18 of the Vienna Convention on the Law of Treaties, or as a third state against the obligations incurred because of the common heritage principle being declaratory of customary international law, the adoption of national law is contrary to lex lata. Should any commercial exploitation of the resources occur in accordance with national laws or so-called "mini-treaty" arrangements, the legality of such activity might be questioned before the ICJ.[321] In the event such incompatibility with existing international law is established by the ICJ,

irrespective of the fact that some of the states with national laws have not made any Optional Clause declaration under Article 36(2) of the court's statute, such a ruling will undoubtedly have adverse impact on stability[322] and legal security which are required for the large and risky investments in deep sea mining. It also seems difficult to imagine how states with deep sea mining laws may, in the face of such pronouncement, continue issuing exploration and exploitation licences without instigating the possibility of conflict.[323]

SECTION VII: EVALUATION

In summary, it can be recalled that the exploration system as laid down in the Convention and generally known as the Parallel System contains three elements of access to the sea-bed, balance of rights between the Authority and the developing countries in association with the Authority on the one side and the remaining states parties and public or private entities on the other, and a review mechanism which makes it possible to revise Part XI of the Convention. Provisions relating to the first two elements favour the potential deep sea mining countries. Any entity with the necessary technology and capital may acquire unrestricted access to the resources without the Authority being able to refuse his application except in a few predetermined cases.

The Convention accords a circumscribed preferential treatment to the developing countries. The real balance can be achieved only

through giving these countries a genuine superior status over technologically advanced countries. Balance in this case cannot mean equality in rights and duties. Achievement of such a balance depends, inter alia, on the outcome of the work of the Preparatory Commission and later the Review Conference. The Convention provisions concerning the latter still permit modifications in the Parallel System which may bring it closer to the "purpose" of Part XI of the Convention.

Since the only objective of national law for deep sea mining is to protect the national interests of the enacting state in a domain where the international interest is established and, in fact, is predominant, such laws cannot be legally justified, and invoking arguments such as the interim nature of these laws, disclaimer of sovereignty and existence of a right emanating from the principle of the freedom of the high seas cannot hold in the face of universal consensus of the principle of the common heritage of mankind. Mere reference in national law to some provisions similar to those of the Convention may not change the status of these laws either, and a closer study of the contents of these statutes and the Convention reveals the fact that there is indeed no similarity.

The rights that third states may claim to benefit from the Convention are derived from the provisions which either contain pre-existing customary international law, or a new law which has been transformed into customary law. In the latter case, it should be noted that, because of two unprecedented and unique characteristics of the Convention, i.e., universality and package quality, there is a general balance among the provisions which

reflects the harmonization of interests of the participating states in the Conference.

If a new rule of customary law is acknowledged by an overwhelming majority of states as such in the context of the general balance of interests, that rule is valid against the third states too. On the other hand, if the new rule of customary law reflects a particular balance with another rule in the Convention, the existence of which is dependent on the first rule, the rights derived from neither of them can be claimed by a third state unless the obligation from the other one is assumed.

Deep sea mining is a novel use of the seas. The industrialized countries of the West have as actively as other countries participated in the drafting of a legal regime for this novel use. Their deep sea mining laws are in contradiction to the purpose of the Convention, and once they start the commercial exploitation of the deep sea-bed resources under their own legislation, one may expect the ICJ to be requested to rule on their legality. A probable adverse ruling of the court may justify the reasonable reactions of the rest of the world against such unilateral facts.

Footnotes - Chapter Five

1. Forming the 35-nations Ad Hoc Committee was the first collective step leading to the UNCLOS III from 1973 to 1982. The Ad Hoc Committee was formed in accordance with Resolution 2340 (XXII) (1967). This resolution was adopted in the United Nations General Assembly by 99 votes to none, with no abstention. This resolution laid down two main objectives for the Ad Hoc Committee: reservation of the deep sea-bed exclusively for peaceful purposes and the use of its resources for the benefit of mankind. Both these objectivies were derived from the principle of the common heritage of mankind as suggested by Pardo in 1967. In fact, based on these guiding principles and others, the 1982 Convention establishes a legal regime governing the exploitation of the common heritage (Articles 150 to 153 and Annex III) and created an international organization to be in charge of its management (Articles 156 to 185 and Annex V). The establishment of the Ad Hoc Committee, then the UNCLOS III which adopted the 1982 Conventions, plainly approved the fact that no states believed, from the outset, that unilateral exploitation on the basis of the freedom of the high seas as existed before the UNCLOS III, was adequate. Section II of this chapter discusses the two principles cited in Resolution 2340 (XXI) and its later developments.

2. Off. Rec., Vol. 1, p.157, para. 19 (Peru).

3. UN Doc. A/AC.138/25, p.2, Article 5; and A/AC.138/26, p.6, para. 10 (The United Kingdom).

4. UN Doc. A/C.1/PV.1782, para. 42 (Ecuador).

5. UN Doc. A/C.1/PV.1588, para. 143 (Ceylon (Sri Lanka)).

6. UN Doc. A/AC.135/SR.13-26, p.52 (the United States); Off. Rec., Vol. V, p.65, para. 18 (The Philippines). On the definition of "peaceful purposes" in the context of the deep sea-bed mining, see T. Treves, "La notion d'utilization des espaces marins a des fines pacifiques dans le nouveau droit de lemer", in XXVI Annuaire Francais (1980), pp.687-99.

7. UN Doc. A/AC.138/SR.5, p.48.

8. UN Doc. A/C.1/PV.1592, paras. 9-12; A/AC/138/SR.6, p.54.

9. General Assembly Off. Rec. 24th session supplement No. 22 A/7622. Report of the Ad Hoc Committee to study the peaceful uses of the Sea-Bed and the Ocean Floor beyond the limits of National Jurisdiction, 1969.

10. UN Doc. A/C.1/PV.1605 and 1648.

11. UN Doc. 135/1.P.20. The representative of Trinidad and Tobago also supporting the total demilitarization of the sea-bed, in an intervention at the First Committee of the General Assembly, stated: "The provision, for example, restricting the use of the environment 'for peaceful purposes' is an expression certainly offered in good faith but one which from a political point of view is so wide that it is capable of abuse from far too many angles. Nuclear missiles are being installed with the declared intention that they should 'contain agression' and 'ensure freedom'. Even microbiological warfare research is being conducted at many centres throughout the world 'for peaceful purposes', and for 'defensive purposes'. We feel that the aim should be . . . that the environment should be completely demilitarized . . .". See UN Doc. A/C.1/PV.1601, para. 171.

12. 9 ILM (1971), pp.145-50. The Sea-Bed Treaty concluded at Washington, London and Moscow, 11 February 1971. See 23, UST, 701. As of 1 January 1988, 87 states had ratified the treaty. See U.S. Department of States, Treaties in Force. A List of Treaties and other International Agreements of the United States in Force on January 1, 1988.

13. Off. Rec., Vol. I, p.65, para. 22 (Iran).

14. Off. Rec., Vol. 5, pp.56-57, paras. 4-5.

15. Article 141 of the Convention reads: "The Area shall be open to use exclusively for peaceful purposes by all states, whether coastal or land-locked, without discrimination and without prejudice to the other provisions of this party.

16. See R. Wolfrum, "The Principle of the Common Heritage of Mankind", 43 ZaoRV (1983), pp.313-37, at p.320.

17. Article 301 of the Convention has some relation to Article 2(4) of the United Nations Charter. The latter was discussed intensively in the 1986 case relating to Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States) (Merits) 1986, p.672. This case is reported in 76 ILR, Cambridge: Grotius Publications Ltd., 1988.

18. UN Doc. A/C.1/PV.1676, para. 109.

19. UN Doc. A/C.1/PV.1594, para. 104 (Ecuador).

20. UN Doc. A/C.1/PV.1529, para. 38 (Belgium); A/C.1/PV.1528, para. 62 (Ecuador).

21. See UN Doc. A/C.1/PV.1773, para. 19 (Malta). The United States decided, in August 1969, to dump a quantity of nerve gas in the Atlantic Ocean. This caused much discussion in the Sea-Bed Committee and the First Committee of the General Assembly. See, e.g., UN Doc. A/C.1/PV.1773, para. 19 (Malta); A/C.1/PV.1675, para. 53 (Cameroon).

22. Apart from Article 145 of the Convention, which specifically deals with the prevention from pollution because of activities in the Area, the whole Part XII of the Convention is devoted to the question of protection and preservation of the marine environment. For more treatment of this question, see "The Environmental Regime" p.563 in the 1982 Convention on the Law of the Sea, Law of the Sea Institute 17th Conference 1983. Honolulu: University of Hawaii.

23. UN Doc. A/8021, p.185.

24. Ibid., p.186.

25. Ibid., p.190.

26. UN Doc. A/8421, p.55.

27. UN Doc. A/8021, p.145.

28. Ogley, op. cit., p.142.

29. See, e.g., The Comments of Japan in this respect, Off. Rec., Vol. III, p.64, para. 5.

30. UN Doc. A/CONF.62/C.1/L.6 (United States); A/CONF.62/C.1/L.8 (EEC); A/CONF.62/C.1/L.9 (Japan).

31. Article X of the American proposal refers to the income of the Authority but it is not elaborated whether the income is for covering the administrative expenses or distribution among states parties or both. Article XI of the EEC proposal makes a vague reference to the "participation in the activities envisaged of nationals of countries without sea-bed exploration and exploitation capabilities, with a view to ensuring the training of such nationals", but it is not necessarily a reference to the developing countries.

32. UN Doc. A/CONF.62/C.1/L.7.

33. According to the representative of Peru, the essential purpose of the Authority was: ". . . to cater for the needs of the peoples, however small the country, of the international community in accordance with the notion of service rather than profit, since the property to be administered was social and universal. The ideas of international social property, service rather than profit, a cooperative system, full participation by all States, and democratic management and control contributed the firmest guarantee that the common heritage of mankind would really benefit all peoples, in other words, the whole human race." See Off. Rec., Vol. I, p.157, para. 49 (Peru).

34. This position was the reflection of the social and economic systems of these countries where the greater part of the public services such as communication, health, education and

management of natural resources are undertaken by the private sector on the basis of competition and profit making.

35. Off. Rec., Vol. III, p.38, para. 27 (the Soviet Union).

36. Ibid., p.39, para. 28.

37. Ibid.

38. For a comparison of opinions about this issue, see Off. Rec., Vol. III, pp.64-65, para. 7-3 (the United States); ibid., paras. 14-18 (Zaire); ibid., pp.65-66, paras. 19-21 (the United Kingdom).

39. See CP/Cab.12/C.1.

40. A.M. Post, Deep Sea Mining and the Law of the Sea, p.145. The Hague: Nijhoff, 1983.

41. See UN Doc. A/CONF.62/C.1/L.7 (1974).

42. See supra note 29 and the accompanying text.

43. E. Miles, "An Introduction of the Geneva Proceedings - Part I", 3 ODIL (1976), pp.187-224, at p.199.

44. UN Doc. A/CONF.62/WP.8, part 1.

45. J.R. Stevenson and B.H. Oxman, "The Third United Nations Conference on the Law of the Sea: The 1975 Geneva Session", 69 AJIL (1975), 763-97, at 769.

46. See UN Doc. A/CONF.62/WP.8/Rev.1/Part I, p.1.

47. Ibid., p.11.

48. Post, op. cit., p.159.

49. ISNT, Article 6.

50. RSNT, Article 5.

51. RSNT, Annex I, Article 9(4).

52. For the text of Kissinger's speech in this respect, see 75 Department of State Bulletin (1976), 397-99.

53. See UN Doc. A/CONF.62/L.16, pp.5-6.

54. Ibid., p.5; Ogley, R.C., Internationalizing the Seabed, p.147. Gower: Aldershot, 1984.

55. First Committee Workshop Paper No. 1, dated 17 August 1976.

56. First Committee Workshop Paper Nos. 2 and 3 respectively, dated 19 August 1976.

57. UN Doc. A/CONF.62/L.16, p.5.

58. B.H. Oxman, "The Third United Nations Conference on the Law of the Sea: the 1976 New York Sessions", 71 AJIL (1977), pp.247-69, at p.250.

59. UN Doc. A/CONF.62/L.16, p.9.

60. Ibid., p.10.

61. Post, op. cit., p.161.

62. See B.H. Oxman, 1977 session, op. cit., pp.57-83, at p.59.

63. UN Doc. A/CONF.62/WP.10.

64. Post, op. cit., p.159; Oxman, 1977 session, op. cit., p.58.

65. The United States considered the provisions of Part XI of the ICNT as "a substantial setback for agreement on an international regime for the conduct of seabed mining". See Oxman, 1977 session, op. cit., p.59.

66. ICNT, Article 151(3).

67. According to Annex II, para. 7 (iv) of the ICNT, which deals with the financial terms of contracts between the Authority and states or companies, one of the objectives of the Authority is: to provide incentives on a uniform and non-discriminatory basis for contracts to undertake joint arrangements with the Enterprise and developing countries or their nationals, and to stimulate the transfer of technology thereto.

68. Of particular interest is para. 4(c)(ii), according to which every applicant shall: "Undertake to negotiate upon the conclusion of the Contract, if the Authority shall so request, an agreement making available to the Enterprise under licence, the technology used or to be used by the applicant, in carrying out activities in the Area on fair and reasonable terms in accordance with paragraph 5(j)(iv) of the annex"; and para. 5 (j)(iv) which reads: "The Authority may require that the Contractor make available to the Enterprise the same technology to be used in the Contractor's operation on fair and reasonable terms . . ."

69. Since production limitation was based on the demand for nickel, it was industrialized producing countries which were according to this article protected, and producers of cobalt and manganese - mostly poor developing countries - could be faced with overproduction and depression of prices. See E. Mann-Borgese, "The Role of Sea-Bed Authority in the 80s and 90s". The Common Heritage of Mankind Workshop of the Hague Academy of International Law, p.8, 1981.

70. A/CONF.62/WP.10, Article 150(b)(i).

71. Oxman, op. cit., p.59.

72. ICNT, Article 151(1)(g)(c).

73. See infra note 139 of this chapter.

74. Ibid., Article 153(2).

75. Ibid., Article 153(3).

76. Ibid., Article 153(6).

77. Oxman, op. cit., p.59.

78. Ogley, op. cit., p.158.

79. Document NG1, 10, p.5, dated 11 May 1978.

80. Ibid., p.7.

81. Ibid., p.8, para. 5(j)(iv).

82. B.H. Oxman, "The Third United Nations Conference on the Law of the Sea: The Seventh Session (1978)", 73 AJIL (1979), pp.1-42, at p.11.

83. Ogley, op. cit., p.154.

84. UN Doc. A/CONF.62/WP.10/Rev. 1.

85. Ibid.

86. Ibid., Annex II, Article 5(1)(c).

87. According to para. 5(d)(iii) of Annex II of the ICNT, the Authority shall negotiate with the applicant concerning "transfer of technology under programmes and measures pursuant to article 144, and paragraph 4 (c)(ii) of this Annex". Article 144 of the ICNT explicitly requires the applicant to transfer the technology he uses to the developing countries.

88. These grounds are: 1- if the site applied for coincides with another application for the same site already approved or not yet acted on; 2- if the application is for areas "where substantial evidence indicates the risk of serious harms to a unique environment" [Article 162(2)(w)]; 3- if the production as a result of the approval of the application may lead to the raising of the total production over the limit set in Article 151(2); 4- if granting the contract would lead to the acquisition by one single State or its companies of too large a share of the total areas available for mining. See UN Doc. A/CONF.62/WP.10/Rev. 1, Annex II, Article 6(3).

89. For example, Article 12(5) of Annex II in the Chairman's report reduces the production charge in the single system from 8 to 5 per cent of the market value of the processed metals produced from the nodules in the first ten years of the commercial production and from 13.5 to 12 per cent in the second year.

90. UN Doc. A/CONF.62/WP.10/Rev. 1, Article 151(2)(a).

91. Ibid., Article 151(2)(b).

92. UN Doc. A/CONF.62/WP.10/Rev. 2.

93. UN Doc. A/CONF.62/WP.10/Rev. 3/Add. 1.

94. The developing countries had virtually given up hopes of any success in emphasizing their original demands, partly because of the fact that the length of the Conference had made many delegations tired and impatient and there was a feeling that South-North dialogue in this forum had come to a stalemate, and partly because they had realized that even the patience and will of the industrialized countries for negotiation had a limit.

95. Annex II, Articles 5(7), ICNT/Rev. 3.

96. Annex III, Article 5(3)(e), ICNT/Rev. 3.

97. UN Doc. A/CONF.62/C.1/L.27 (Part II), p.3, para. 12.

98. UN Doc. A/CONF.62/WP.10/Rev.3/Add. 1, Article 151(2)(b)(iv). See also B.H. Oxman, "The Third United Nations Conference on the Law of the Sea: The Ninth Session, 1980", 75 AJIL (1981), pp.211-56, at p.216.

99. UN Doc. A/CONF.62/WP.10/Rev. 3, Add. 1, Article 150(1) which reads "conditions of access to markets for the imports of minerals produced from the resources of the Area and for imports of commodities produced from such minerals shall not be more favourable than the most favourable applied to imports from other sources".

100. UN Doc. A/CONF.62/WP10/Rev. 1, Article 155(6).

101. UN Doc. A/CONF.62/WP.10/Rev. 3, Article 155(6).

102. Ibid.

103. UN Doc. A/CONF.62/WP.10/Rev. 1, Annex III, Article 9(2).

104. UN Doc. A/CONF.62/WP.10/Rev. 3/Add. 1, Annex IV, Article 10(3).

105. UN Doc. A/CONF.62/WP.10/Rev. 3, Annex III, Article 5(3) and (7).

106. Ibid., Annex IV, Article 11(3)(a) and (b). With respect to the manner in which assessment of the regular UN budget is calculated and the wide diversity in the quantum of assessed contributions, one can provide the following: the United States pays about 25% of all contributions, the USSR 10.54%, Japan 10.32%, and FR Germany 8.54%, according to 1984 estimates. See United Nations Yearbook 1984, "Status of Contributions to the UN Regular Budget for 1983-1985: Scale of Assessments", pp.1129-30.

107. Ibid., Article 11(3)(b).

108. See supra note 85.

109. Article 153(2)(b) dealing with the private entities as miners provides that they should either "possess the nationality of states parties or are effectively controlled by them or their nationals, when sponsored by such states . . ."

110. See supra note 87.

111. UN Doc. A/CONF.62/WP.10/Rev. 3, Annex III, Article 6(2)(a).

112. Ibid., Article 162(2)(w).

113. Ibid., Annex III, Article 18(1)(a) and (b).

114. The chief delegate of the United States, e.g. stated: ". . . the Conference should be proud of the results achieved at the present session as a result of the firm resolve of all delegations to complete substantive negotiations: for the first time since 1973 the substance of a new comprehensive treaty was close to completion". Off. Rec., Vol. XIV, p.39, para. 114.

115. Oxman, 1980 session, op. cit., p.212.

116. The referred Republican Party platform plank stated: "Multilateral negotiations have thus far insufficiently focused attention on U.S. long-term security requirements. A pertinent example of this phenomenon is the Law of the Sea Conference, where negotiations have served to inhibit U.S. exploitation of the sea-bed for its abundant mineral resources. Too much concern has been lavished on nations unable to carry out sea-bed mining with insufficient attention paid to gaining early American access to it. A Republican Administration will conduct multilateral negotiations in a manner that reflects America's ability and long-term interest in access to raw material and energy resources." Quoted in D.A. Larson, "The Reagan Administration and the Law of the Sea", 11 ODIL (1982), pp.297-320, at p.298.

117. Congressman John B. Breaux of Louisiana, a state with extensive offshore oil and gas exploitation, who had long been considered as a staunch proponent of the unilateral

legislation, in a testimony - which was demonstrative of the stand of the mining industry against the Draft Convention - before the Subcommittee on Oceans of the Senate Foreign Relations Committee stated: There is, I believe, a message that must be conveyed to the Third World and Soviet Bloc: We will not meekly submit to the New International Economic Order; we will not mildly consent to the ruin of our system of values as a free enterprise society. We will not quietly retreat from our rights and responsibilities as the leader of the Free World; we will not capitulate to our political and military adversaries. We will protect the vital interests of the United States; we will have due regard to reasonable aspirations, but not unreasonable demands of the developing countries. (emphasis original). Quoted In Larson, ibid., p.300.

118. B.H. Oxman, "The Third United Nations Conference on the Law of the Sea: The Tenth Session, 1981"; 76 AJIL (1982), pp.1-23, at p.2.

119. For discussion about these changes, see Ogley, op. cit., pp.170-75.

120. C.A. Stephanou, "A European Perception of the Attitude of the United States at the Final Stage of UNCLOS III with Respect to the Exploitation of the Deep Sea-Bed", in C.L. Rozakis and C.A. Stephanou (eds.), The New Law of the Sea, pp.259-78, at p.260. Amsterdam: North Holland, 1983.

121. This group, which bore the name of "The Friends of the Conference", included Australia, Austria, Canada, Denmark, Finland, Iceland, Ireland, New Zealand, Norway, Sweden and Switzerland. See Ogley, op. cit., p.173.

122. Resolution II Governing Preparatory Investment in Pioneer Activities Relating to Polymetallic Nodules, reprinted in United Nations Publications, Sales No.E.83, V.5, pp.177-82, New York, 1983.

123. The list of pioneer investors includes the following:
1- Kennecott Consortium (KCON), formed in January 1974, composed of Kennecott Corporation (40% - controlled by British Petroleum, the United Kingdom), RTZ Deepsea Mining Enterprises Ltd. (12%, The United Kingdom), Consolidated Gold Fields, PLC (12%, the United Kingdom), BP Petroleum Development Ltd. (12%, the United Kingdom), Noranda Exploration Inc. (12%, Canada), and Mitsubishi Group (12%, Japan). Estimated spending up to the end of 1985 is 88 million U.S. dollars.
2- Ocean Mining Associates (OMA), formed in May 1974, composed of Essex Minerals Company (25%, the United States) Union Seas Inc. (25%, Belgium), Sun Ocean Ventures (25%, the United States) and Samim Ocean Inc. (25%, Italy). Estimated spending is 158 million dollars.
3- Ocean Management Incorporated (OM), formed in February 1975, composed of Inco Inc. (25%, Canada), SEDCO Inc. (25%,

the United States), Arbeitsgemeinschaft Meeretechnisch Gewinnbare Rohstoffe (AMR) (25%, the Federal Republic of Germany) and Deep Ocean Minerals Company (DOMCO) (25%, Japan). Estimated spending is 70 million dollars.
4- Ocean Minerals Company (OMCO), formed in November 1977, composed of Amoco Ocean Minerals Company (31%, the United States), and Lockheed Corporation (the United States), Royal Dutch Shell (the Netherlands), Royal Bos Kalis Westminster (the Netherlands) totally 69%. Estimated spending is 196 million dollars.
The information about the consortia is based on UN Doc. ST/ESA/107/Add. 1/1982.

124. The Convention Resolution II, para. 1. For more details, see Chapter Seven.

125. The Convention, Article 161(1)(a).

126. Ibid., Article 155(3).

127. Ibid., Article 155(4).

128. The Preparatory Commission is the subject of Chapter Seven.

129. K.M. Ioannou, "Some Preliminary Remarks on Enquiry in 1982 Convention on the Law of the Sea", in Rozakis, op. cit., pp.97-106, at p.99.

130. Ibid.

131. See supra note 79 and the accompanying text of Chapter Three.

132. The reference of U.S. congressman in 1967 to the Malta's proposal as untimely and premature could be interpreted that at least in the United States some people thought that because of lack of State practice, negotiating a legal regime for deep sea-bed was premature. See UN Doc. A/C.1/PV.1515, p.1.

133. Larson, op. cit., p.298.

134. The Convention, Article 150.

135. Ibid., Article 150(c) and (d), 144(a) and 148.

136. Ibid., Article 150(f).

137. Ibid., Article 150(h) and (j).

138. Ibid., Article 153(1).

139. The inclusion of peoples who have not attained full independence in the concept of mankind as a whole was first done by Engo, the Chairman of the First Committee of the Conference, in Article 151(9) of the ICNT in 1977. Because of the reactions of the industrialized countries, it was

proposed by the Negotiating Group I, in its proposal NG1/3 dated 21 April 1978, to be deleted. In the first revision of the ICNT in 1979, it was reintroduced and finally in the Draft Convention, it was incorporated in Article 140. In order to minimize the anxieties of the industrialized countries, it was provided in Article 140(2) that for an equitable sharing of financial and other economic benefits derived from activities in the Area, the necessary rules should be approved by the Authority's Assembly [Article 160(2)(f)(i)] and Council [Articles 161(8)(d), and 162(o)(i)].

140. The term "access" means access to mining sites for prospecting, exploration and exploitation activities.

141. The Convention, Annex III, Article 4(1). If the applicant has more than one nationality, like in the case of partnership or consortium of entities from several States, all States Parties involved shall sponsor the application. Ibid., Article 4(3).

142. Ibid., Annex III, Article 4(2).

143. Ibid., Article 157(1), which is supplemented by Article 4(6)(b) of Annex III.

144. See Ogley, op. cit., p.156. See also the Convention, Annex III, Article 17(b)(viii).

145. The Convention, Annex III, Article 4(6)(c).

146. Ibid., Article 137(2).

147. Article 5, para. 8 of the Annex III of the Convention defines the term 'technology' as applied in that article to mean: ". . . the specialized equipment and technical know-how, including manuals, designs, operating instructions, training and technical advice and assistance, necessary to assemble, maintain and operate a viable system and the legal right to use these items for that purpose on a non-exclusive basis".

148. Ibid., Article 144(2)(a).

149. Ibid., Annex III, Article 5(3)(a).

150. Ibid.

151. Ibid.

152. Ibid., Annex III, Article 5(3)(b).

153. Ibid., Annex III, Article 5(3)(c).

154. Ibid.

155. Paragraph 12(a)(iii) of the Resolution II provides that every registered pioneer investor shall "undertake before the entry into force of the Convention, to perform the obligations prescribed in the Convention relating to transfer of technology".

156. See, e.g., L.S. Ratiner, "The Law of the Sea: A Crossroads for American Foreign Policy", 60 Foreign Affairs (1982), pp.1006-21, at p.1015.

157. The Convention, Annex III, Article 13(1)(b) and (a).

158. Ibid., para. 1(e).

159. W. Hauser, The Legal Regime for Deep Sea-bed Mining Under the Law of the Sea Convention, p.83. Deventer: Kluwer, 1983.

160. The Convention, Annex III, Article 13(2).

161. The Convention, Resolution II, para. 7(a).

162. The Convention, Annex III, Article 13(3).

163. Ibid., Annex III, Article 13(5)(a).

164. Ibid., Annex III, Article 13(6)(c)(i).

165. Development costs means all expenditures incurred prior to the commencement of commercial production. Ibid., Annex III, Article 13(6)(h).

166. Operating costs means all expenditures incurred after the commencement of commercial production. Ibid., Article 13.

167. Ibid., Annex III, Article 13(6)(d)(i).

168. Ibid., Annex III, Article 13(6)(a)(i).

169. Ibid., Annex III, Article 13(6)(a)(ii) and (d)(ii).

170. Ibid., Annex III, Article 13(6)(a)(ii).

171. Ibid., Annex III, Article 13(6)(c)(ii).

172. Hauser, op. cit., p.85.

173. Ogley, op. cit., p.185.

174. Ibid.

175. This view is held in the Convention too. Article 170(1), e.g., is a clear indication that transportation, processing and marketing are not considered as "activities" in the Area.

176. Hauser, op. cit., p.81.

177. Ogley, op. cit., p.159.

178. The Convention, Annex III, Article 13(6)(e).

179. Ogley, op. cit., p.161.

180. Resolution 11 sets out detailed criteria for getting an applicant registered as pioneer investor thereby recognizing the exclusive right of the applicant to an area of maximum 150,000 square kilometres [paragraph 1(e) and 6], and his priority right in getting production authorization after entry into force of the Convention (paragraph 9).

181. Ratiner, op. cit., p.1015.

182. The Convention, Articles 140 and 150.

183. Ibid., Annex III, Article 4.

184. The Convention, Annex III, Article 1.

185. Ibid., Annex IV, Article 12(4).

186. See infra note 6 in Chapter Seven. Polymetallic sulphides is a newly discovered marine mineral resource. The sulphides are composed of a basal mound surmounted by a chimney stack. Their principal economic components are zinc, copper and silver. The existence of these resources was first discovered at the end of the 1970s, but the publication of a report by the United States National Oceanic and Atmospheric Administration in 1981 threw light on their economic significance. See Clark (ed.), "Marine Metallic Resources of the Pacific Basin", 3/1 MRE (1986), pp.45-62, at p.53.

187. Ibid., Articles 150(h) and 151(1)(a).

188. See supra note 90 and the accompanying text.

189. The Convention, Article 151(3).

190. Ibid., Article 151(2)(a).

191. Ibid., Article 151(2)(b) and (d).

192. See supra note 91 and the accompanying text.

193. See supra note 129 and the accompanying text.

194. Article 152 dealing with exercise of powers and functions by the Authority reads:
"1. The Authority shall avoid discrimination in the exercise of its powers and functions, including the granting of opportunities for activities in the Area.
2. Nevertheless, special consideration for developing States, including particular consideration for the land-locked and geographically disadvantaged among them, specifically provided in this Part shall be permitted".

195. The Convention, Article 140(2).

196. Ibid., Article 151(10).

197. Ibid., Article 151(1)(a).

198. Ibid., Article 151(1)(b).

199. Ibid., Annex IV, Article 11(2)(b).

200. Ibid., Annex IV, Article 11(3)(b).

201. In the Resolution II, the expression "certifying State" is used to denote the same thing as "sponsoring State" in Annex III, Article 4(3), i.e., the State of which the applicant is a national. Paragraph 1(c) of the Resolution II defines the "certifying State" as "a State which signs the Convention, standing in the same relation to a pioneer investor as would a sponsoring State pursuant to Annex III, article 4, of the Convention and which certifies the levels of expenditure specified in subparagraph (a) [$30 million in pioneer activities].

202. Resolution II, para. 12(b)(i).

203. The Convention, Annex IV, Article 10(3).

204. The Convention, Annex IV, Article 13(4)(e).

205. Ibid.

206. Ibid., Annex IV, Article 13(4)(d).

207. The idea of a provision for revising the system of exploitation after a certain period of time was initially supported by the industrialized countries. The United Kingdom, e.g, in a working paper to the Sea-Bed Committee in 1970, referred to an eventual agreement for the international regime, and contended:
"Such an agreement should contain provisions for review after an appropriate period of time to take account of

international experience and of technological developments. The review would be without prejudice to acquired rights and would not affect the conditions attaching to existing licences and sub-licences without the consent of the licencees and sub-licencees."
See UN Doc. A/AC.138/26.

208. Article 155 deals with the review procedure of the system of exploration and exploitation of the resources of the Area. For the review of the practical operation of the legal regime governing the Area, Article 154 provides for a periodic review. Accordingly, every five years after the entry into force of the Convention, the Assembly shall undertake a general review of the manner in which the regime has operated in practice, and if necessary take measures in accordance with the provisions of Part XI and related Annexes to improve the operation of the regime. Moreover, if a State Party deems necessary an amendment to provisions concerning the activities in the Area such as those related to the Sea-Bed Disputes Chamber and other than those which fall under the mandate of the Review Conference according to Article 155, it may address its written proposal of amendments to the Secretary-General of the Authority. According to Article 314 of the Convention, such amendments after approval of the Council and the Assembly shall be considered adopted. It will enter into force for all States Parties one year following the ratification or accession by three fourths of States Parties [Article 316 (5)].

209. The Convention, Article 155(1).

210. Ibid.

211. R.J. Dupuy, "The Notion of Common Heritage of Mankind Applied to the Seabed", in Rozakis, op. cit., pp.199-208, at p.206.

212. The Convention, Article 155(2). The amendment procedure in Article 155 as such is not entirely new. Article 108 of the UN Charter permits changes in the Charter, binding on all states, to enter into effect after ratification by two-thirds of the states parties, including all of the permanent members of the Security Council. But this procedure is more favourable for the industrialized states than Article 155 because of the requirement of ratification by all the permanent members of the Security Council; these members can at all times prevent unwanted changes. Article XVII(a) of the Agreement on the IMF and Article VIII(a) of the Statutes of the World Bank also permit treaty modifications adopted by a majority but binding on all states parties. These articles differ from Article 155 of the Convention because the procedures are more difficult and the amendment power is more limited. See Hauser, op. cit., p.128.

213. Hauser, op. cit., p.129.

214. The Convention, Article 155(3).

215. Ibid., Article 155(4).

216. Dupuy, op. cit., p.207.

217. The Convention, Article 155(5).

218. Article 153(6) reads:
"A contract under paragraph 3 shall provide for security of tenure. Accordingly, the contract shall not be revised, suspended or terminated except in accordance with Annex II, articles 18 and 19".

219. The text of these laws is reproduced in ILM in the following order:
"The Federal Republic of Germany (20 ILM, pp.393-98); The United Kingdom (20 ILM, pp.1217-27); France (21 ILM, pp.808-14); The Soviet Union (21 ILM, pp.551-53); Japan (22 ILM, pp.102-22); and Italy (24 ILM, pp.983-96)".

220. The relevant provisions appear in the American Act, section 118; the German Act, Section 14; and the British Act, section 3(1).

221. Reproduced in 21 ILM, pp.950-62, 1982.

222. R.P. Anand, "UN Convention on the Law of the Sea and the United States", 24 IJIL, April 1984, p.180. Canada signed the 1982 Convention. In their view the mini-treaties regime could not offer complete legal certainty to its members. For a full view on the Canadian attitudes to the Convention, see UN Doc. A/39/PV.99, p.149. And for their view on the mini-treaties as against the common heritage principle, see Mohamed Bennouna, Droit international du development, p.130. Paris: Perger-Levrault, 1983.

223. Operative paragraph 1 of the Reciprocating States Agreement, op. cit., p.951.

224. Ibid., p.950.

225. D.L. Larson, "The Reagan Rejection of the U.N. Convention", 14 ODIL (1985), pp.337-61, at p.349.

226. Reproduced in 23 ILM (1984), pp.1354-60.

227. Ibid., paragraph 1. See supra note 123.

228. Section 4(4) of the American Act.

229. Section 6 of the British Act.

230. Section 2(4) of the German Act.

231. Article 2 of the French law; Article 2 of the Italian law.

232. Paragraph 1 of the Soviet law.

233. Chapter 1, Article 2(2) of the Japanese law.

234. Section 2(b)(3) of the American Act.

235. Section 1(1) and (2) of the British Act.

236. Section 1 of the German Act.

237. E.D. Brown, "The Impact of the Unilateral Legislation on the Future Legal Regime of Deep Sea-Bed Mining", 20 Archiv des Volkerrecht (1982), pp.145-82, at p.149.

238. Article 1 of the French law.

239. Article 1 of the Italian law.

240. Article 1 of the Japanese law.

241. The preambular paragraphs of the Soviet law.

242. D.D. Caron, "Municipal Legislation for Exploitation of the Deep Seabed", 8 ODIL (1980), pp.256-97, at p.285.

243. This indication was mentioned in the Bill of the U.K. as follows: "The Bill is consistent with the proposals developed at the Conference. It has been specifically designed to be compatible with an internationally agreed regime, as envisaged in the draft Convention." See Brown, The Impact, op. cit., p.150.

244. P.V. McDade, "The Interim Obligation Between Signature and Ratification", 32 NILR (1985), pp.5-47, at p.32.

245. Section 3(2) of the American Act.

246. Article 3 of the Italian law; Charter 1(2) of the Japanese law.

247. Oxman, 1978 session, op. cit., p.33.

248. Section 3(2) of the American Act.

249. G. Biggs, "Deep Sea Mining and Unilateral Legislation", 8 ODIL (1980), pp.223-57, at p.250.

250. D.P. O'Connell, The International Law of the Sea, Vol. II, pp.796-99. Oxford: Clarendon Press, 1984.

251. O'Connell, op. cit., p.797.

252. Section 4(1) of the American Act.

253. Section 2(2) and 2(3)(b) and (c) of the British Act.

254. Section 2(2) of the German Act.

255. Article 2 of the French law.

256. Article 2(2) of the Japanese law.

257. Article 2 of the Italian law.

258. Section 102(b)(2) of the American Act.

259. Section 102(b)(3) of the American Act.

260. Articles 5 and 6 of the French law.

261. Section 4(14) of the American Act.

262. Articles 1 and 3 of the French law; Article 1 and 3 of the Italian law; Section 3 of the German Act.

263. Section 1(4) of the British Act.

264. Section 1(5) of the British Act.

265. Articles 11(1) and 40 of the Japanese law.

266. Paragraph 1 of the Soviet law.

267. Paragraph 4 of the Soviet law; Article 4 of the French law,; Article 7 of the Italian law.

268. Section 103(a)(2)(D) of the American Act; Section 10(2) of the German Act.

269. According to Brown, this was one of the arguments made by the British Government against the opposition in Parliament who wanted the insertion of the anti-monopoly provisions in the British Act. See Brown, The Impact, op. cit., p.162.

270. Article 6 of the French law.

271. Paragraph 8 of the Soviet law.

272. Section 4495(b) of the American Act.

273. Section 12(2) of the German Act.

274. See Brown, The Impact, op. cit., p.165.

275. Paragraph 18 of the Soviet law.

276. Although not specifically referring to financial terms, Article 42 of the Japanese law leaves the rules concerning the application of the laws related to deep sea-bed mining to be decided by the Cabinet.

277. Brown, The Impact, op. cit., p.167.

278. Section 403(b) of the American Act.

279. Section 4498 of the American Act.

280. Section 403(e) of the American Act.

281. Paragraph 18 of the Soviet law.

282. See Lord McNair, The Law of Treaties, pp.309-21. Oxford: Clarendon, 1961; L. Oppenheim, International Law, Vol. I (edited by Lauterpacht), 8th edition, pp.925-26. London: Longmans, 1963; UN Doc. A/AC.138/12/Add.1, p.50.

283. UN Doc. A/CONF.39/27.

284. Ian Brownlie, Principles of Public International Law, 3ed edition, pp.277-78. Oxford: Clarendon, 1979.

285. See L.T. Lee, "The Law of the Sea Convention and Third States", 77 AJIL (1983), pp.541-68, at p.547.

286. Article 35 of the Vienna Convention states: "An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing".

287. The ILC, with reference to the draft articles which later became Article 35 of the Vienna Convention and the strict requirement of written acceptance by the third State, commented that: "There is, in effect, a second collateral agreement between the parties to the treaty, on the one hand, and the third State on the other; and that the juridical basis of the latter's obligation is not the treaty itself but the collateral agreement." See YBILC Yearbook 1966, Vol. II, p.227. See also C. Parry, "The Law of Treaties:, in Sørenson (ed.), Manual of Public International Law, pp.175-245, at p.219. London: Macmillan, 1968.

288. See, e.g., McNair, op. cit., p.259; O'Connell, International Law, op. cit., Vol. I, pp.23-24; UN Doc. A/AC.138/12/Add. 1, pp.52-53.

289. O'Connell, op. cit., p.23.

290. O'Connell considers legislative treaties as significant instruments in our time because: "It is not possible in this dynamic age to await the crystallisation of customary law,

for practice, and the evidence of practice, grows only with time. Common problems are therefore resolved by resort to multilateral conventions, and since in matters of narcotics, white-slavery, etc., the minority which stands outside the treaty is so small the treaty rules are indeed almost general law." O'Connell, International Law, op. cit., pp.23-24.

291. UN Doc. A/AC.138/12/Add.1, p.53.

292. ICJ Reports 1949, p.147.

293. Ibid., p.185.

294. Oppenheim (Lauterpacht), op. cit., p.929.

295. Parry, op. cit., pp.175-245.

296. The first preambular paragraph of the Convention.

297. See, e.g., UN Doc. A/CONF.62/PV.185 (Cameroon).

298. Ibid.

299. Even the Charter of the United Nations which is generally considered to be the most significant document in international law was originally adopted by some fifty states, and many of the third world countries had no role in its drafting.

300. B. Zuleta, Introduction the United Nations Convention on the Law of the Sea, United Nations Publication, Sales No. E.83.V5, 1983.

301. UN Doc. A/CONF.62/PV.185.

302. UN Doc. A/AC.138/SR.83, p.64.

303. UN Doc. A/CONF.62/PV.187.

304. ICJ has put, in The North Sea Continental Shelf Cases, several conditions for the transformation of a conventional rule of international law. Two of these conditions are: "the very widespread and representative participation in the convention, including states whose interests are specifically affected and extensive and virtually uniform state practice". ICJ Reports 1969, p.3, at pp.42-43, paras. 73-74.

305. ICJ, in Case Concerning the Contintental Shelf (Tunisia v. Libyan Arab Jamahinya), stated that: "the concept of the exclusive economic zone may be regarded as part of modern international law". See ICJ Reports 1982, p.18, at p.74, paragraph 100.

306. UN Doc. A/CONF./62/PV.192.

307. Article 38 of the Convention. See Lee, op. cit., p.557.

308. See XXII ILM (1983), p.464.

309. See Lee, op. cit., p.551.

310. See Anand, UN Convention, op. cit., p.194.

311. Ibid.

312. A sign of such intention is the use of terms "no state", "states", "all states", "all countries" in Articles 137, 138, 141, 150 of the Convention; but in almost all Parts of the Convention examples like these can be found. On the relation of the language of the treaties and the rights and obligations of the third states, see Lee, op. cit., p.546.

313. UN Doc. A/CONF.62/77.

314. Orrego Vicuna, with reference to the argument of the United States in defence of its national legislation that only rules of the international law may impose restrictions on the acts of States, maintains: "Cela est precisement ce que les Nations Unies ont fait, en developpant progressivement le droit international dans ce domaine, avec l'appui meme des Etats-Unis." F. Orrego Vicuna, "Les legislations nationales pour l'exploitation des fonds des mers et leur incompatibilite avec le droit international", in 24 Annuaire francais (1978), pp.810-26, at p.823.

315. UN Doc. A/CONF.62/PV.190. The representative of the United Kingdom to the Conference, in a similar statement, said: ". . . with regard to those provisions which seek to make new law, the parties to the Convention will assume among themselves a new contractual relationship. This will not deprive others of existing rights nor, of course, can a conventional regime or obligation be imposed on them. Existing rights such as those which derive from the freedom of the high seas, as well as existing conventional law, will remain. UN Doc. A/CONF.62/PV.189.

316. B. Vukas, "The Impact of Third United Nations Conference on the Law of the Sea on Customary Law" in Rozakis, op. cit., pp.33-54, at p.36.

317. The states which have passed unilateral legislation and are parties to the 1958 Geneva Conventions are the following: the U.S., the U.K., Belgium, Italy, Japan and the USSR. For the status of the 1958 Geneva Conventions, see Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1987. New York: United Nations, 1988. See also, Treaties in Force, supra note 12.

318. Brown, The Impact, op. cit., p.147.

319. For discussion on Article 18 of the Vienna Convention on the Law of Treaties and its relation with Part XI of the Convention on the Law of the Sea, see J.K. Gamble, Jr., "The significance of signature to the 1982 Montego Bay Convention on the Law of the Sea", 14 ODIL (1984), pp.121-60, at pp.126-29; McDade, op. cit., pp.25-28.

320. The ICJ, in its advisory opinion in Reservation to the Convention on the Prevention and Punishment of the Crime of Genocide, speaking about the purpose of this instrument, said: "The origins and character of that Convention, the objects pursued by the General Assembly and the contracting parties, the relations which exist between the provisions of the Convention, inter alia, and between those provisions and these objects, furnish elements of interpretation of the will of the General Assembly and the parties. ICJ Reports 1951, p.15, at p.23.

321. The possibility of challenging such activities before the General Assembly and seeking for the advisory opinion of the Hague Court has been mentioned by Tommy Koh, the President of the Conference. See David L. Larson, op. cit., p.349. For discussion on the possibility of a legal proceeding before the ICJ, see R.S. Moss, "Insuring Unilaterally Licensed Deep Seabed Mining Operations Against Adverse Rulings by the International Court of Justice: An Assessment of the Risk", 14 ODIL (1984), pp.161-191.

322. The British Branch Committee on Deep Sea Mining of the 1970 ILA Reports, p.830.

323. Regardless of the result of an adverse ruling of the ICJ, it has been predicted that commencement of commercial exploitation under national legislation may give rise to threats of company boycotts, seizure of assets, attachment of shipment and legal entanglements. See Anand, UN Convention, op. cit., p.182.

CHAPTER SIX

THE INTERNATIONAL SEA-BED AUTHORITY

SECTION I: THE UNITED NATIONS ROLE

The idea of establishing an international organization for the administration of the Area and its resources was born with the designation of the sea-bed and its resources as the common heritage of mankind. Malta's representative, in his introductory speech before the First Committee of the General Assembly in 1967, announced:

> . . . our long-term objective is the creation of a special agency with adequate powers to administer in the interest of mankind the oceans and the ocean floor beyond national jurisdiction. We envisage such an agency as assuming jurisdiction, not as sovereign, but as a trustee for all countries over the oceans and the ocean floor. The agency should be endowed with wide powers to regulate, supervise and control all activities on or under the ocean floor. 1

Although the Ad Hoc Committee made only incidental references to the issue,[2] pursuant to the initiative of several developing countries,[3] in 1968, the General Assembly requested the Secretary General, through Resolution 2467 (XXIII), to undertake a study on the question of establishing in due time an appropriate international organization for the promotion of the exploration and exploitation of the resources of the sea-bed area. The result of the study, as presented to the Sea-Bed Committee in 1969, contained three different types of machinery for registration, licensing or operation.[4]

After considering this report at the Sea-Bed Committee and statements for or against any of these three types, the General Assembly once again requested the Secretary-General to prepare a further study on the same issue.[5] This time, however, the General

Assembly was specific in requesting an in depth study of an international organization with powers exceeding registration and licensing; an organization with power to regulate, coordinate, supervise and control all activities relating to the exploration and exploitation of sea-bed resources for the benefit of mankind as a whole, with particular attention to the needs and interests of the developing countries.

The comprehensive report of the Secretary-General[6] was issued on 26 May 1970, and further discussions in the Sea-Bed Committee on the basis of this report and many other deliberations resulted in the submission of several alternative draft articles by that Committee to UNCLOS III.[7] The developments in the Conference finally resulted in the adoption of a form of compromise by the organs, and particularly the Council, that reflects the special interests of the different groups' procedure in the executive body which is nearly equal to weighted voting.

It is our intention, after the review of the developments which led to such a compromise, to briefly describe the structure, powers and functions of the organs of the Authority as set out in the Convention and then to examine the dispute settlement system for disputes relating to the activities in the Area.

The question of an international organization, although as important as the exploitation system, did not occupy much of the UNCLOS III time, and problems relating to it such as the composition of its organs, the competence and functions of them, and the power relation between these organs, seemed to be more or less possible.[8] Before we dwell on the study of the International Sea-Bed Authority, it may be appropriate to have a glance at the

attitudes of different states in regard to the establishment of an international organization for the management of the sea-bed and its resources.

SECTION II: THE NEED FOR AN INTERNATIONAL ORGANIZATION

The division of states between developing and developed holds true even in the case of controversies over the need to establish an international machinery. It was generally the view of the industrialized countries that a "regime" for the deep sea-bed did not necessarily have to include "machinery".[9] On the other hand, the developing countries argued that the principle of the common heritage of mankind could have a meaning only when and if there were an international organization to enforce it. Mexico, in an intervention in the First Committee of the General Assembly, supported this position by arguing:

> The San Francisco Conference did not confine itself to drafting a series of purposes and principles but set up the United Nations for the fulfilment of the former and the observance of the latter, so that legal regime (for the deep sea-bed) must include the establishment of suitable international machinery with similar aims. 10

While the technologically advanced countries tended to derive the force of their argument from the French doctrine of dedoublement de fonctionnel and assume for themselves as members of the international community the right of each to administering the common heritage of mankind on behalf of all the others, the

developing countries, not being in the position to do likewise, rejected the argument of the advanced countries.

Here, too, as in the case of the definition of the common heritage of mankind, the socialist countries led by the Soviet Union initially sided with the West in rejecting the need for the establishment of any organization for the management of the sea-bed resources.[11] The main reason was that the Soviet Union, like the United States and some other industrialized countries, intended to confine the mandate of the eventual treaty to the exploration and exploitation of the mineral resources of the deep sea-bed,[12] whereas for the developing countries the treaty should comprise "not only exploration and exploitation but also marketing, distribution of the profits, disarmament etc."[13] To carry out all these duties, the establishment of a new international organization seemed inevitable. The Soviet Union, moreover, considered the creation of an international organization for the management of the common heritage as a utopian idea which

> would probably - as in any other sphere of human activities today lead either to complete collapse of international cooperation in this field or to seizure by great monopolies of virtual control over marine resources . . . 14

Although there were these initial categorical rejections of any form of international machinery, it was soon realized "that the machinery . . . was indispensable for a workable and meaningful regime in which all the states would have real participation",[15] and the idea was incorporated in paragraph 9 of the Declaration of Principles, in 1970. This unanimous acceptance, nevertheless did not reflect the acceptance of any particular type of international machinery with agreed upon competence and composition. The

disagreement about the international organization was as large as the diverse interpretations of the common heritage principle. The reports of the Secretary-General constituted the basis of discussions. Both in the Sea-Bed Committee and the General Assembly it was generally held that there was an intimate connection between the principles applicable to the sea-bed and its resources and the kind of international organization required to ensure the effective implementation of the regime to be based on those principles.[16] Thus, the developing countries demanded the establishment of a strong organization with a comprehensive mandate and competence.[17] Such a demand gave rise to doubt for the emergence of a supranational organization. Those who were against the third alternative of the Secretary-General, namely, an operational agency, accused such an agency of being "supranational".

The term "supranational" which, during the 1960s, was very topical, had not gained any agreed legal content.[18] It was, therefore, natural that indiscriminate reference to that term by different delegations was more confusing than enlightening. What could be deduced from these references was that by supranational the speakers usually meant a sort of organization which could make decisions independent of the will of the Member States, and as such its independent existence was assailable.[19] But, even for those who were in favour of a strong organization with unfettered competence for the management of the deep sea-bed and its resources, the term "supranational" could mean different things.[20]

The industrialized countries had several arguments against an international organization with powers of direct exploration and exploitation. These arguments were generally based on the reality

of business transactions and the complexity which might arise as a result of allowing an international organization to act as a commercial entity.[21] The industrialized countries and the Eastern European States, while accepting the need for some sort of international organization, favoured a registry, or at most a licence issuing institution.[22]

The views expressed by the representatives of small countries such as Sweden, Norway and Denmark showed that these countries considered it more realistic not to include direct exploration and exploitation in the powers of the international machinery. For Norway, "coordination", "regulation" and "supervision" were necessary functions of the machinery,[23] while Denmark named "registration" and "some form of licensing arrangements" as the main functions.[24] According to Sweden, the international machinery "should provide more than a registry of claims and entail at least a system for licences and leases for exploration and exploitation . . ."[25]

There was, thus, a spectrum of different opinions about various types of international organization among different groups of states. One may observe that, even among the developing countries, there was no uniformity in this respect. While many of these states held the view that the organization should have the capacity to carry out the exploration and exploitation activities on its own, there were others which doubted the advisability of conferring such a power on the machinery.[26] In short, the diversity of opinions ranged from supporting the exercise of sovereignty or jurisdiction by the international machinery in the sea-bed to denying such an

exercise totally lest the said machinery considered the sea-bed as its own property.[27]

Another related question was the relation of the proposed international organization to the United Nations. Generally speaking, the developing countries which advocated an organization with extensive powers were in favour of an autonomous organization outside the United Nations system. They did not see the existing international organizations as prototypes for the new organization, since the comprehensive powers it was supposed to enjoy would render it distinguishable from all other international organizations. Moreover, since its powers were to be greater than the United Nations General Assembly, unlike most of the specialized agencies, it could not be subject to the Assembly's control.[28]

The technologically advanced countries favoured a machinery within the United Nation system, or even one which already existed for some other purposes. Sweden, for instance, as late as 1974, when the weight of opinion was in favour of an organization outside the United Nations, held the view that:

> The Authority, whose relationship with the United Nations should be regulated in a special agreement, should be required under the Convention to report to the United Nations General Assembly, although the latter should not interfere in matters relating to the activities of the Authority. Linking the Authority to the United Nations should help it to carry out its mandate. 29

The idea of placing the new institution inside the framework of the United Nations, however, did not gain much support, and soon faded away.[30]

After reaching a more or less general agreement in the Sea-Bed Committee that the proposed organization should at least comprise two organs, a council as the governing body and an assembly as the

plenary, the core of discussions concerning the international organization was three interrelated questions of the organs of the Authority, their composition and their powers and functions. The diversity of opinions about the type of organization had its impact on the debates concerning these three issues too.

The main points of difference between the developing and industrialized countries regarding the institutional arrangement turned out to be "the distribution of powers and functions between the suggested Assembly and the Council; the formula for the decision-making process in the two organs; the composition of the Council; and the number of the other necessary principal and subsidiary organs of the Authority".[31]

The alternative draft articles on the International Sea-Bed Authority submitted by the Sea-Bed Committee to the UNCLOS III,[32] reflected these differing views. At the first substantive session of the UNCLOS III in Caracas in 1974, it was generally acknowledged that, except for the Assembly and the Council as the two main organs of the Authority, one or more of the following organs, namely, a secretariat, an Enterprise and tribunal were to be established as part of the Authority. For some states, all these five organs were to be considered as principal organs of the Authority, while others supported three or four main organs, having the rest as subsidiary ones.[33]

The creation of these five organs did not prove to be a controversial problem. Many states, however, expressed doubts over the desirability of establishing a sea-bed tribunal as an organ of the Authority, and expressed preference for leaving the competence for settlement of all disputes to a law of the sea tribunal. The

G77, which supported the idea of creating a sea-bed tribunal, accepted in 1977 the suggestion of the industrialized countries that a special chamber of the law of the sea tribunal be created, independent of the organization of the Authority, to settle the dispute relating to deep sea mining.

What remained as a conflict was the distribution of power between the Assembly and the Council. For the developing countries the observance of the principle of sovereign equality of states in the creation of the Authority was of major significance. Thus, they strongly supported the creation of the Assembly as the truly supreme organ of the Authority comprising all member states with a one-state one-vote voting system. The Assembly, in their view, ought to play a "superior overall policy-making role over the other principal organs of the Authority".[34]

The position of the industrialized countries was principally based on the premise that no organ of the Authority should be endowed with a status superior to the others. Thus, their objective was to contain or constrain the discretionary powers of the Assembly as well as to elevate the influence of the Council in proportion to that of the Assembly.[35] While the developing countries assumed a power for the Assembly to set the general policies, regulations and direction for the day-to-day activities of other organs of the Authority and in that way attributed a controlling character to that organ, for the developed states the main task of the Assembly was approving very broad policy lines.[36]

According to the initial position of the developing countries, the Council as the executive organ of the Authority was to determine specific policies in conformity with the general policies laid down

by the Assembly. In the view of these countries, membership in the Council had to be limited, and composition to be solely based on the equitable geographical representation.[37] Even here, like in the case of the Assembly, the main principle was the sovereign equality of states and any form of weighted voting on the basis of special interest or allocation of permanent seats was excluded.[38] The industrialized countries, on the contrary, held the position that the Council should have wide executive powers, and in exercising its powers it should be to a great extent autonomous. The composition of the Council, in their view, had to reflect the "special interests" of certain states.[39]

In 1975, the developing countries made a gesture of compromise by conceding to "special interests" as a criterion for the membership of certain states in the Council,[40] thereby accommodating a significant demand of the developed countries, but some members of the G77 still insisted that, irrespective of the composition, the Council had to be controlled by the Assembly.[41] In the ISNT, which was the outcome of the 1975 session of the UNCLOS III, the compromise of the developing countries was included in the form of allocating 12 out of the total 36 seats to the countries with special interests.[42] It should be noted that the acceptance of representation of special interests in the Council by the developing countries did not mean that any group of states with special interests was accorded more powers or weighted vote. The socialist countries, which had by then accepted the principle of the common heritage of mankind, while supporting the position of the developing countries with respect to the composition of the Council "insisted that they should have special representation in the Council, and

be accorded the same protection desired by the West since they represented one of the major socio-economic systems of the world".[43]

In the 1976 session of the UNCLOS III the composition of the Council did not change, and further discussions on this subject as well as the distribution of the power between the Council and the Assembly were deferred to later sessions. In Article 159 of the ICNT, which was issued in 1977, the 36 seats in the Council were distributed between 18 seats representing special interests, and the remaining 18 elected in accordance with the principle of equitable geographical distribution.[44] The division of representation based on special interests and special qualifications on the one hand, and on equitable geographical distribution on the other, held in the following sessions, and was finally adopted in the Convention. Nevertheless, deliberations concerning the composition of the first half of the Council's members, namely, those elected on the basis of their special interests, continued intensively in order to achieve a combination which would give the three main interest groups, i.e., the Group of 77, the socialist states and the industrialized countries, acceptable representation in order to prevent any group of states from a veto or weighted vote.

Some smaller industrialized countries like Austria, Finland and Spain, knowing that they would be unlikely to qualify to be elected to the Council as belonging to a special interest group such as 'consumer', 'producer', etc., complained at their disadvantageous representation, and pressed for the enlargement of the Council's membership or an increase of the number of seats in each geographical group from one to two. The idea of enlargement was rejected by both the Super Powers on the ground of the destabilizing effect

that such a move might have on the delicate balance achieved in the voting procedure.[45] Even the suggestion for an increase in the number of guaranteed seats was not attained "because of politically unacceptable consequences in other categories".[46] The extensive efforts of these countries in 1979 and 1980, when the consensus about the composition of the Council seemed to have been finally commanded, did not lead to any success, and they had practically no option except to accept under-representation in the Council.[47]

From 1978 to 1980, the main forum for deliberations concerning the composition of the Council and other related issues was Negotiating Group 3. The institutional questions relating to the legal regime of the deep sea-bed constituted the mandate of the Negotiating Group 3, which was chaired by Paul Engo, the Chairman of the First Committee of the Conference.

The problem of decision-making in the Assembly and the Council is closely related to the question of composition, powers and functions of these two organs. In the case of the Assembly, as the plenary organ in which all member states participate and each has one vote, the usual voting formula for most of the international organizations, i.e., two-thirds majority for the questions of substance and simple majority for other questions, was supported by the developing countries.[48] The industrialized countries were in favour of a higher majority. As a compromising step, the ICNT provided for two qualifications to the said formula, namely the two-thirds majority should include the majority of states participating in that session of the Assembly, and the President could, under certain conditions, defer voting on a question of

substance for a limited time. These provisions were incorporated in the Convention.[49]

The decision-making process in the Council proved to be more complicated. The efforts of the G77 to subordinate the Council to the Assembly notwithstanding, it was clear that as the executive organ, the Council would have the competence to take decisions with direct effect on the functioning of the exploitation system. That was why the Group of 77, the socialist states and the industrialized countries all had it as their objective to save a voting formula which would protect their vital interests.[50] Engo, in a memorandum concerning the decision-making process in the Council, briefly elaborated on the position of the developing and developed countries in this respect:

> From the point of view of the developing countries, the present Convention will have a precedent-setting effect underlying the changing mood for greater and more effective participation of all sections of the international community in all important decisions reflected by future international agreements and conventions. The developing countries are aware that whatever concessions they make on this question are likely to be quoted against them in other negotiations between North and South. The developed countries, while feeling comfortable with the nature of interaction between on-going forces in the contemporary international society, and having regard to what they hold dear as vital interests, have had to adjust to the new realities in order to secure legality that is universally recognized. 51

The point of departure for all three groups of states was that each member state had one vote. The Group of 77, relying on its numerical majority, preferred the same formula as applied to the Assembly, namely, a two-thirds majority for the questions of substance and a simple majority for others. The socialist states initially did not have a uniform position, and their favourite voting pattern could range from consensus to simple majority.[52]

The industrialized countries were generally in favour of weighted voting, because, they argued, without their investment and technology, no international regime for the sea-bed mining would be viable.[53] Besides, the socialist states and the industrialized countries had one common goal: to prevent the developing countries from imposing their will in the Council. This required setting up a voting system in which the overall majority in the Council was balanced by a majority in each of the different groups with special interests.

In an effort to combine all interests, Jens Evensen, chief delegate of Norway, in 1977 produced a compromise formula according to which the 18 members representing special interests were categorized in four "chambers" - six developing countries, four ocean mining states, four importers of the metals in question and four land-based producers. The remaining 18 members of the Council, elected according to geographical distribution, constituted the fifth chamber. The decisions of the Council, according to Evensen's formula, were to be taken by a two-thirds majority but it had to include the simple majority of at least four of the five chambers.[54] The developing countries reacted negatively to the so-called chambered voting seeing it as a sort of veto right for the industrialized countries.[55]

Later discussions in the Conference revealed that any solution acceptable to all the states with respect to the decision-making process of the Council had to take account of several factors: the need to seek consensus in the first place; in the absence of consensus, the affirmative vote of an overall majority of members to a decision; a protective blocking vote by geographical regime.[56]

The voting process of the Council, as is set in the Convention, tends to encompass all these considerations. According to this process, besides the requirement of a simple majority for the procedural questions, the questions of substance have been divided into three categories for which a two-thirds majority, three-fourths majority, or consensus are required.[57]

The difficulty in reaching an agreement concerning the composition and voting process in the Council and the final compromise in the form of a so-called "three-tier system" reflect the understanding that the Council possesses extensive powers concerning the main task of the Authority, i.e., rational management of the mineral resources of the deep sea-bed. Its power now is far more than the developing countries originally had anticipated. The structure of the organs of the Authority, and their powers and functions as enunciated in the Convention, disclose to what degree the interests of mankind are balanced by the interests of individual states or groups of states through providing for a system of power distribution which aims to fit into the purposes of the parallel system of exploitation. The following discussion aims to examine this structure and power distribution, and to evaluate the extent of the Authority's chances to fulfil its mandate through the present system.

SECTION III: THE AUTHORITY

(a) Status and General Aspects

The establishment of the Authority is envisaged in Article 156 of the Convention, which also recognizes the ipso facto membership of all states parties to the Convention in the Authority. Besides, it provides for the observer status for those who were observers at the UNCLOS III.[58] Article 156(4) has specified Jamaica as the seat of the Authority, but regional offices in other places can be established.

The Authority is a genuine international organization with an international legal personality and necessary legal capacity "for the exercise of its functions and the fulfilment of its purposes".[59] According to Articles 177-183, it has all privileges and immunities recognized for inter-governmental organizations.[60]

The Authority is based on the principle of sovereign equality of its members, and they all undertake to fulfil in good faith the obligations assumed by them.[61] In the event a member is in arrears with the payment of its financial contributions for more than two years, or has grossly and persistently violated the provisions of Part XI of the Convention, the exercise of its voting rights or privileges of membership may be suspended.[62]

(b) The Mandate and Functions

Article 157 of the Convention, under the title of natural and fundamental principles of the Authority, describes the functions of the Authority. According to this article, "The Authority is the organization through which States Parties shall in accordance with this Part, organize and control activities in the Area, particularly with a view to administering the resources of the Area". Thus, in fulfilling its mandate, i.e. development of the common heritage of mankind to the benefit of all,[63] it exercises three main functions: organizing, controlling and administering.[64]

1. Organizing function

The organizing function of the Authority includes the adoption of rules, regulations and procedures for, inter alia, the appropriate conduct of activities in the Area (Article 17 of Annex III), the protection of the marine environment [Article 145(a)], the protection and conservation of natural resources of the Area [Article 145(b)], and the protection of human life with respect to the activities in the Area (Article 146). The Convention pays special attention to the first categories of regulation concerning activities in the Area, and particularly specifies some objective criteria concerning the operational aspect of the activities such as the determination of the size of the areas, duration of operations, performance requirements, specification of the categories of resources, etc.[65] The Authority, in fulfilling this function, does not confine itself to setting out regulations merely for the

harmonization of activities, but in fact envisages practical measures which may entail implications for the actors, and require active participation and full observance by them. In this way the organizing function of the Authority implies more than mere regulations.

2. Controlling function

For those who consider the Authority as an international organization with a supranational character, the controlling function is in fact the most illustrative evidence of this character. It may be pointed out that "control" in this context should be restrictively interpreted to mean supervision of compliance of obligations incumbent upon the contractors. According to Article 139 of the Convention:

> States Parties shall have the responsibility to ensure that activities in the Area, whether carried out by States Parties, or state enterprises or natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, shall be carried out in conformity with this Part (Part XI). The same responsibility applies to international organizations for activities in the Area carried out by such organizations.

In order to check if the states parties have complied with this obligation, the Convention, in Article 153(4), accords to the Authority the right to "exercise such control over activities in the Area as is necessary for the purpose of securing compliance with relevant provisions [of the Convention] . . ."[66]

To exercise the controlling function, the Authority is not required to secure the consent of the states or the companies engaged in the activities in the Area. The Authority shall

have the right to take any measures, in the framework of the provisions of the Convention with activities in the Area, to ensure compliance.[67] Apart from the general provisions for the control of activities by the Authority, the Convention envisages the inclusion of provisions concerning the Authority's functions of control and regulation in specific contracts between the Authority and the applicant.[68] Besides, as a part of the controlling function, it is provided for the Authority to adopt rules, regulations and procedures for the inspection and supervision of operations in the Area.[69]

3. Administering function

While the organizing and controlling functions of the Authority are not controversial, and the majority of the international organizations exercise these functions to varying extents, the administering function, which, in this case, implies, inter alia, wide executive powers including policy making, direct and effective participation in activities in the Area and some related engagements, is unprecedented in international relations.

Adede, in an effort to demonstrate this unique feature of the Authority, makes a comparison between this organization, on the one hand, and the Intergovernmental Maritime Consultative Organization (IMCO) and the International Civil Aviation Organization (ICAO), on the other. He says:

> engaging in the actual money-making business of exploiting the sea-bed 'by the Authority' is akin to asking both IMCO and ICAO to acquire and run shipping lines and airlines respectively as a business on behalf of the international community and

in competition with the rest of the traditional actors in trade. 70

It may be added that the Authority not only shall exploit the mineral resources of the deep sea-bed on behalf of the international community, but also shall possess the power to decide within the framework of the provision of the Convention, which entity may engage in the activities and under what conditions. The competence for the approval of the plans of work, the selection from among the applicants for production authorizations, and the issuing of the actual authorizations for mineral production is vested in the Authority.[71]

The executive power of the Authority, which is exercised through its administering function, extends not only to the exploitation aspect of the activities, but also to the preparatory aspects of marine scientific research and technology transfer. According to Article 143(2) of the Convention:

> The Authority may carry out marine scientific research concerning the Area and its resources, and may enter into contracts for that purpose. The Authority shall promote and encourage the conduct of marine scientific research in the Area, and shall co-ordinate and disseminate the results of such research and analysis when available.

In this way, the Authority, independent of the states parties, will be able to carry out marine scientific research, but all the states parties have the duty to ensure the development of programmes for the training of the Authority's personnel in the techniques and application of research.[72]

An important task of the Authority which may fall under the category of its administering function is "to acquire technology and scientific knowledge relating to activities in the Area", and "to promote and encourage the transfer to developing states of such

technology and scientific knowledge so that all states parties benefit therefrom".[73] As far as "acquiring" the technology is concerned, there are two possibilities for the Authority. Either the necessary technology is available on the open market, in which case the Authority should try to obtain it on fair and reasonable commercial terms, or it is not available on the open market. In the latter case, the power of the Authority in obtaining that technology is circumscribed and qualified by the conditions set forth in Article 5 of Annex III of the Convention.[74]

The duty of the Authority to promote technology transfer is repeated in Article 274(c) of the Convention, where it is required to ensure that adequate provision is made:

> . . . to facilitate the acquisition of technical assistance in the field of marine technology by States which may need and request it, in particular developing States, and the acquisition by their nationals of the necessary skills and know-how, including professional training.

Nevertheless, it is not envisaged how this function can be fulfilled in the event the required technology is not available on the open market.

There is no doubt that the most disputed, and at the same time significant part of the Authority's administering function, is its power to take decisions concerning the exploitation aspect and measures to determine, and if necessary adjust, the undesired economic consequences of that exploitation. At the top of the list of administering functions of the Authority stands its competence to accord the contractor the exclusive right in respect to the Area of operation and the category of minerals he is entitled to exploit.[75] This is an inherent competence derived from the Authority's status as the trustee of mankind.

The Authority, as the administrator of the common heritage of mankind, is empowered to take measures "to ensure orderly, safe and rational management of the resources of the Area . . ."[76] This, in fact, constitutes a significant part of the Authority's mandate. Since unchecked overflow of the minerals derived from the deep sea manganese nodules into the markets may give rise to disturbances in the balance of supply and demand, it is in the competence of the Authority to take measures to promote the "stability of markets for those commodities produced from the minerals derived from the Area at prices remunerative to producers and fair to consumers".[77]

As one measure to achieve this end, the Convention has conferred upon the Authority the right "to participate in any commodity conference dealing with those commodities and become a party to any arrangement or agreement resulting from such conferences".[78] The right to exercise this function of the Authority is, however, qualified by the condition that the conference should not include only the producers of the land-based minerals similar to those exploited from the Area, but the consumers as well, that being a measure to curtail any effort by the Authority and the developing countries to enter into agreements against the major consumers. It is also noteworthy that the competence of the Authority in this respect is limited to those minerals which are produced from the manganese nodules in the Area. Thus, due to the extended coastal jurisdiction occasioned by the introduction of the concept of the EEZ and a new definition of the outer limit of the Continental Shelf, there is a possibility that the first exploitations of manganese nodules may occur in areas under the

jurisdiction of countries like Mexico, Ecuador or Chile, where the Authority lacks any competence.[79]

Another measure is that the Authority, through its plenary organ - the Assembly - shall establish a system of compensation for those developing countries which suffer most from the adverse effect of activities in the Area on their economy and export earnings.[80]

In order to fulfil its mandate and carry out the general functions mentioned above, the Authority has included several organs in its organization. To see how well these organs may guarantee the accomplishment of the purposes of the Authority, a study of these organs, their composition, powers and functions, as set out in the Convention, is appropriate.

(c) Organs of the Authority

The Convention, in Article 158(1), established three principal organs for the Authority, namely, the Assembly, the Council and the Secretariat. The Enterprise - the operating arm of the Authority in charge of direct exploitation in the Area - is not included in the list of principal organs.[81] Besides, the Authority is entitled to create subsidiary organs if it is deemed necessary.[82]

1. The Assembly

The Assembly is designated, in Article 160 of the Convention, as the "supreme organ" of the Authority to which other principal organs, i.e., the Council and the Secretariat, shall be accountable.

Article 159 of the Convention, concerning the composition, procedure and voting scheme of the Assembly, stipulates that each member shall have one representative and one vote, and a majority of members shall establish a quorum. The Assembly shall meet at the seat of the Authority or wherever it decides to meet on a regular basis, sessions can be held.[83]

The decision-making procedure at the Assembly is like the procedure in the plenary of the majority of the international organizations: a simple majority for procedural questions and a two-thirds majority of the members present and voting for substantive questions provided the latter should include the majority of the states participating in that particular session.[84] This decision-making process has put the developing countries in an advantageous position, and with regard to their number, they will have a comfortable majority in the Assembly. There is, however, one specific case when the decisions of the Assembly shall be adopted by consensus. That is when the financial contributions of states parties for funding the Enterprise's activities in its first mine site are insufficient. In this case, the Assembly shall, at its first session, adopt measures by consensus for dealing with the shortfall.[85] Voting on any proposal before the Assembly can be deferred on two grounds: firstly, if one-fifth of the members of the Assembly request the president of the Assembly to defer the voting on a substantive question for a maximum of five days provided this period does not extend beyond the end of the session; and secondly, when one-fourth of the members have in writing requested the president to ask the advisory opinion of the Sea-Bed Dispute

Chamber on the conformity of a proposal before the Assembly with the Convention.[86]

With regard to the powers and functions of the Assembly, it should be pointed out that the Assembly, as the supreme organ, "shall have the power to establish general policies in conformity with relevant provisions of [the] Convention on any question or matter within the competence of the Authority".[87] Apart from this general competence, one may classify these powers into two groups. There are certain functions of the Assembly which may be fulfilled only in connection with related functions of the Council, whereas the second group consists of those functions which shall be exercised solely by the Assembly and on its own initiative. We shall return to the first group after the discussion about the Council and its powers.

As regards the second group, it may be pointed out that almost half of the functions of the Assembly have a non-executive and general nature in the form of "examine reports", "initiate studies" and "consider problems".[88] The remaining half of the functions which have more or less an executive nature includes the power to elect members of the Council; to suspend the exercise of rights and privileges of membership; and to assess the contributions of members to the administrative budget of the Authority.[89] In all these cases, the exercise of the powers of the Assembly is related to the specific limitations provided in other provisions of the Convention. In other words, the extent of the power is circumscribed by predetermined stipulations. Nevertheless, there are two cases where the Convention seems to have endowed the Assembly with discretionary powers; these are the establishment of

subsidiary organs and the taking of decisions upon the equitable sharing of financial and other economic benefits derived from activities in the Area. In these cases, although the decisions of the Assembly shall be consistent with the Convention and certain criteria shall be observed, the extent of its power is nevertheless relatively broad.[90]

Kiss summarized the observations concerning the composition, voting procedure and powers of the Assembly by saying that they are similar to a national parliamentary body in certain states.[91]

2. The Council

Provisions concerning the composition, procedure and voting of the Council are included in Article 161 of the Convention. The Council, as the executive organ of the Authority, with 36 members from among the members of the Authority, is vested with the power of establishing specific policies, in conformity with the Convention and general policies adopted by the Assembly "to be pursued by the Authority on any question or matter within the competence of the Authority".[92]

i Composition:

The members of the Council are elected by the Assembly under a carefully designed scheme with a view to obtaining a balance of representation among most states parties,[93] and particularly those with an interest in deep sea mining. The first half of the members, i.e., 18 states, shall represent these interests. They include: 1- four members from among states which have had during

the last five years before their election, more than 2 per cent of total world consumption or import of the minerals similar to those to be derived from the Area. These four should include one socialist state from Eastern Europe, and the largest consumer, which is, and will probably remain for the foreseeable future, the United States; 2- four members from among the eight states parties with the largest investment in deep sea mining, including at least one socialist state from Eastern Europe. This formulation almost automatically guarantees a permanent place for the Soviet Union, which is the largest investor among the socialist countries and has the capability to keep this position; 3- four members from among states parties with the largest export of land-based minerals similar to those to be derived from the deep sea-bed, including at least two developing countries; 4- six developing states parties with special interests, e.g., large populations, land-locked or geographically disadvantaged position, major imports of minerals in question, potential capability of producing these minerals, and least development.[94] The Assembly is not free to elect any member of these groups to represent that group in the Council, but is bound to observe the nominations which are made inside each group.[95] As has been shown, both Super Powers have secured a de facto permanent membership in the Council.

The eighteen remaining members shall be elected, according to Article 161(1)(e), on the basis of an equitable geographical distribution, but each geographical region shall have at least one member elected.[96] The provision incorporated in Article 161(1)(e) reading "eighteen members elected according to the principle of ensuring an equitable geographical distribution of seats in the

Council as a whole" is to imply that the principle of equitable geographical distribution is not to be limited only to the eighteen seats, but through it such an equitable distribution should be achieved in the composition of the Council as a whole.

As a response to the possibility of limited membership of the Authority, at least during the period immediately after the entry into force of the Convention, and subsequently the possibility of a lack of states parties representing a certain interest or geographical group to fulfil the requirements of the membership in the Council, the Convention, in Article 308(3), has provided that "the first Council shall be constituted in a manner consistent with the purpose of Article 161 if the provisions of that article cannot be strictly applied". A departure from the general rule for the composition of the Council is permitted only for the first Council, but it seems that the exception should continue to be applied as long as the strict application of Article 161(1) is not practicable due to the limited membership of the Authority.[97]

According to some estimates, the aforementioned scheme of membership results in the allocation of almost 50 per cent of the Council seats to the developing countries; 44 per cent to the industrialized countries; and 6 per cent to the socialist states, leaving the last group with the power "to determine which of the first two groups controlled the majority vote on North-South issues".[98] Irrespective of how accurate this estimation is and how close to the truth that forecast may come, the effective functioning of the Council in respect of its decision-making process requires a closer examination.

ii **Voting procedure**:

In the Council too, as in the Assembly, a majority of members shall constitute a quorum, and each member shall have one vote.[99] Decisions by the Council are divided into two groups: procedural and substantive. There is no controversy concerning procedural decisions which shall be taken by simple majority of members present and voting,[100] but the adoption of the question of substance is subject to a specific scheme designed for this purpose. In this scheme, substantive questions are divided into three groups reflecting the least sensitive, less sensitive and sensitive nature of those questions for states parties.

Decisions on questions falling under the first category require, according to Article 161(8)(b), a two-thirds majority of the members present and voting, provided this majority includes a majority of the members of the Council. These least sensitive matters range from transmitting the reports of the Enterprise to the Assembly to entering into agreements with the United Nations or other international organizations.[101] The majority of the decisions in this group have an administrative nature, such as presenting annual reports to the Assembly, notifying the Assembly of the decision taken by the Sea-Bed Dispute Chamber, reviewing the collection of all payments to be made by or to the Authority, and making recommendations to the Assembly for a system of compensation according to Article 15(10).

The second group of decisions, as specified in Article 161(8)(c) requires a three-fourths majority of the members present and voting, provided the majority includes a majority of the members of the Council. In fact, the greater part of the decisions

relating to the exercise of the Council's powers shall fall under this category, which concerns 19 provisions of the Convention.[102] In the case of more than two-thirds of the questions relating to these provisions, the Council can take decisions independently and directly.[103] The decisions concerning the exercise of one of the major functions of the Authority, i.e., the control over the activities in the Area and the supervision and coordination of the implementation of the provisions of Part XI, are also in this category and require a three-fourths majority.

Decisions on the sensitive questions which constitute the third group, according to Article 161(8)(d), require consensus. For the purpose of this provision, the term "consensus" is defined as implying "the absence of any formal objection",[104] but that does not prevent the members of the Council from making reservations or declarations. In order to command consensus, it is envisaged that the President of the Council, in the case it is apparent that there will be an objection to the proposal, shall establish a committee - the conciliation committee - of a maximum of nine members of the Council, and shall make all efforts to reconcile the differences and reach a consensus within two weeks following the establishment of the committee.[105]

The questions which fall into this category are the adoption of the amendments to Part XI of the Convention excluding those modifications which are under the sole competence of the Review Conference, taking measures for the protection of the developing countries from the adverse economic effects caused by the activities in the Area, and recommendations to the Assembly of rules and regulations on the equitable sharing of financial and other economic

benefits derived from the activities in the Area.[106] But the most important issue in this category is undoubtedly the adoption of the rules, regulations and procedures of the Authority governing activities in the Area which are necessary for the implementation of many general principles laid down in the Convention, and constitute the basic legal framework of deep sea mining. The Council may adopt by consensus, and pending their approval by the Assembly, provisionally apply these rules, regulations and procedures, which relate to prospecting, exploration and exploitation in the Area and the financial arrangements and internal administration of the Authority.

There is one more case where the decision of the Council should be taken by consensus: when there is an objection to the approval of a plan of work, and the conciliation committee does not succeed in commanding a consensus. In this case, that plan of work is however considered approved unless the Council decides by consensus to disapprove it. The vote of the sponsoring state for that plan of work is not counted in achieving the consensus.[107]

If the proper category for a certain question is disputed, it should be assumed to require the highest majority unless the Council with the same majority decides otherwise.[108] In the event a question is not listed in the categories mentioned above, but according to the rules, regulations and procedures of the Authority is under the competence of the Council, a decision on it shall be taken pursuant to the category specified by the said rules and regulations, and if not specified, pursuant to the category determined by the Council by consensus.[109]

As is clear from the foregoing explanation, the G77 may rely on its own majority to take decisions only in the case of procedural or least sensitive questions. In the case of less sensitive questions, which constitute the greater part of the Council's functions, the G77 is dependent on the vote of some other countries from among the socialist countries or Western industrialized countries in order to obtain a three-fourths majority.[110] Recalling the role the developed countries insisted on attaching to the Council as a protective device and as a counter-balance to the Group of 77-dominated Assembly "and as a vehicle for the protection of the designated interests of the industrialized countries",[111] it seems that requiring consensus for the decisions on the most significant issues was the only solution acceptable to these countries, but even the socialist countries and the developing countries welcomed consensus as an acceptable and democratic solution.[112]

Since the most important issue in the consensus category, namely, the rules, regulations and procedures of the Authority, is to be handled initially by the Preparatory Commission, it can be anticipated that the draft adopted by that Commission through consensus will remain unchanged because the Council, which is a much smaller forum, may change them only by consensus.[113] This enables the industrialized countries to evaluate, before ratifying the Convention, how these initial draft rules, regulations and procedures will affect the actual conditions of sea-bed mining, and to base their final decisions concerning the ratification of the Convention or accession to it on the assessment. The possibility of having recourse to voting in the case of failure to command

consensus in the last category of Council decisions is not provided for in the Convention. Hence, it may be expected that, notwithstanding safeguards such as the conciliation committee or the duty of the opposing state to explain the grounds on which it opposes the proposal, such a requirement shall lead to the impediment of the whole system of voting in the Council and necessitate an overall review of that system.

iii Subsidiary organs:

In addition to the right conferred upon the Council to establish subsidiary organs for the exercise of its functions,[114] the Convention has established in Article 163, two organs subordinate to the Council: the Economic Planning Commission and the Legal and Technical Commission. The need for such subsidiary organs was felt from the beginning of the work of the UNCLOS III. The ISNT in 1975 contained two organs: an Economic Planning Commission and a Technical Commission. In the RSNT, a rules and regulations committee was added to the previous organs. In 1978, it was decided to combine the functions of the three organs and decrease the number to two: the Legal and Technical Commission and the Economic Planning Commission.

These commissions have certain common features. Each commission is composed of 15 members elected by the Council by a three-fourths majority. Each state party to the Convention can nominate only one candidate for each commission.[115] No person can be elected to serve in more than one commission. In nominating the candidates, who shall hold office for a term of five years, with the possibility of being re-elected for a further term, their

appropriate qualifications in the area of competence of that commission should be taken into consideration.[116] Both the principle of equitable geographical distribution and the representation of special interests shall be observed in the election of members, and in the event of death, incapacity or resignation, the election of another member for the remainder of the term shall be made with regard to the same principles.[117] The members of the commission have an obligation to observe silence, even after the termination of their functions, concerning confidential information which came to their knowledge by reason of their duties for the Authority.[118]

The decision-making procedures of the commissions are to be established by the rules, regulations and procedures of the Authority, but as a part of the agreement about the voting system of the Council in 1980, it was understood that the decisions of the commissions shall be taken by consensus.[119]

The two commissions are advisory in nature. The main task of the Economic Planning Commission, which "shall include at least two members from developing states whose exports of the categories of minerals to be derived from the Area have a substantial bearing upon their economies",[120] is to "propose to the Council . . . a system of compensation or other measures of economic adjustment assistance for developing states which suffer adverse effects caused by activities in the Area".[121] This proposal, according to Article 164(2)(b) and (c), is pursuant to the review of factors affecting supply, demand and prices of the pertinent materials, and the examination of situations which may lead to adverse effects on the economy of the developing countries as enumerated in Article 150(h).

The powers and functions of the Legal and Technical Commission are much broader. Although this commission, too, is entitled mostly to make recommendations to the Council, at least one of its recommendations has in fact the power of a decision. According to Article 165(2)(h), the commission shall "review formal written plans of work for activities in the Area . . . and submit appropriate recommendations to the Council". If the commission recommends approval of the plan, it would be deemed to have been approved by the Council.[122] The commission, whose recommendation concerning the plan of work should be "solely on the grounds stated in Annex III [of the Convention] and shall report fully thereon to the Council",[123] may recommend disapproval of the plan of work, in which case the Council, by a three-fourths majority can, however, approve the plan.[124] Thus, the role of the commission in the approval or disapproval of a plan of work seems to be decisive. It should be remembered that the discretion of the Legal and Technical Commission is, however, restricted by the carefully written conditions laid down in Annex III of the Convention, and the possibility that the commission can deny access to any specific applicant fulfilling all those conditions is remote.

The actual duty of the assessment of the environmental implications of activities in the Area rests on the Legal and Technical Commission. This includes making recommendations to the Council for: 1- taking measures to protect the marine environment against pollution resulting from activities in the Area; 2- issuing emergency orders, either to suspend or adjust operations to prevent serious harm to the marine environment; 3- disapproving areas for exploitation when there is indication of the risk of serious harm to

the environment.[125] In order to transform these recommendations into decisions, the vote of three-fourths of the members of the Council, present and voting, is required.

(d) Division of Power between the Assembly and the Council

Before we proceed to discuss other organs of the Authority, it is appropriate to look at the inter-relationship between the respective powers and functions of the Assembly and the Council.

The Convention specified in Article 160 that the Assembly, being the forum consisting of all the members, shall be considered as the supreme organ of the Authority. In other words, its characterization as supreme organ is merely formal and explicitly due to its composition. The same article empowers the Assembly to establish general policies on any question within the competence of the Authority, but this competence is restricted by the condition that such general policies shall be in conformity with the relevant provisions of the Convention. It is, again in the same article, postulated that the other organs of the Authority are accountable to the Assembly. Here, too, the extent of the accountability is restricted to the limit specifically provided for in the Convention. Hence the supremacy of the Assembly, which has its source in its membership consisting of all members of the Authority, and in its competence to hold the other principal organs of the Authority accountable, seems to be purely symbolic.[126]

As a sign of the supremacy of the Assembly over the Council, reference may be made to the "incidental powers" that the Assembly

enjoys. According to Article 157(2):

> The powers and functions of the Authority shall be those expressly conferred upon it by this Convention. The Authority shall have such incidental powers, consistent with this Convention, as are implicit in and necessary for the exercise of those powers and functions with respect to activities in the Area.

This ambiguous and obviously contradictory formulation seeks to reconcile the position of the industrialized countries, which wanted to see all the powers of the Authority expressly enumerated in the Convention, and the position of the G77, which held the view that the Authority should have, like any other international organization, implied powers necessary for exercising its functions. Substitution of "implied powers" by "incidental powers" has been construed as an effort to avoid any implication of broad implied powers by the Assembly,[127] but it seems to be an unwarranted interpretation, and the net result is that the Assembly possesses the implied powers, and the formulation in Article 157(2) is redundant. Nevertheless, the exercise of the implied powers alone is not sufficient to render the Assembly the supreme organ. In this respect, it should be mentioned that possession of implied powers is not limited to the Assembly; even the Enterprise enjoys such powers.[128] As regards the relation of powers between the organs of the Authority, Article 158(4) makes it explicit that each organ:

> shall be responsible for exercising those powers and functions which are conferred upon it. In exercising such powers and functions each organ shall avoid taking any action which may derogate from or impede the exercise of specific powers and functions conferred upon another organ.

The industrialized countries insisted on clarifying the scope of the exercise of the powers and functions of the Assembly and the Council

in order to avoid any extensive interpretation of such powers for the Assembly as the supreme organ of the Authority. Formulation of Article 158(4) was a response to that demand.

It is left to examine the common areas of decision-making of the Assembly and the Council and to ascertain the status of power division between these two organs with regard to that examination.

We have already discussed, under Section III(c) of this chapter, some of those cases where the Assembly may take decisions independent of any deliberations or recommendations by the Council, and it was noted that in almost all of these cases, the power of the Assembly has been circumscribed by relevant provisions of the Convention.[129]

Among those powers of the Assembly which should be exercised pursuant to deliberations or recommendations of the Council, there are certain cases of a purely administrative nature and, as such, are insignificant to the question of the right of access to the resources of the Area. They include: the election of the Secretary-General, election of members of the Governing Board and the Director-General of the Enterprise, approval of the annual budget of the Director-General of the Enterprise, approval of the annual budget of the Authority and examination of the periodic reports from the Council and from the Enterprise.[130] The most significant power of the Assembly, which has a direct bearing upon the question of who and under what conditions has the right to exploit the deep sea mineral resources, is to "approve the rules, regulations and procedures of the Authority, and any amendments thereto, provisionally adopted by the Council . . ."[131] The significance of this power of the Assembly is due to the fact that

the enforcement of the general provisions laid down in the Convention concerning "prospecting, exploration and exploitation in the Area, the financial management and internal administration of the Authority"[132] is dependent on the way these rules, regulations and procedures are formed.

The relation between the competence of the Council and the Assembly in respect of the provisional adoption and the final approval of these rules, regulations and procedures demonstrates the extent of the real power and influence of these two organs. According to Article 162(2)(o)(ii), the Council shall:

> adopt and apply provisionally, pending approval by the Assembly, the rules, regulations and procedures of the Authority, and any amendments thereto . . . All rules, regulations and procedures shall remain in effect on a provisional basis until approved by the Assembly or until amended by the Council in the light of any views expressed by the Assembly.

The corresponding power of the Assembly is "to consider and approve"[133] these rules, regulations and procedures. It has no power to make amendments and then approve or to draft new provisions itself. What can be understood by reading these two provisions together is that the Assembly has no power to force amendments on the provisionally adopted drafts by the Council, and if the Council does not agree with the amendments proposed by the Assembly, it can continue applying those rules, regulations and procedures by attaching the adjective "provisional" to them. The helplessness of the Assembly as the supreme organ of the Authority, to act against the will of the Council is remarkable. Taking this case together with the approval of the plans of work, which is under the exclusive competence of the Council, leads us to the conclusion that the Assembly possesses a restricted power, and the real power concerning

the decision on the question of access to the resources of the Area and their management resides in the Council. In other words, while the Assembly is formally the supreme organ of the Authority, the Council holds a de facto superior status with real power. This is exactly in line with the original demand of the industrialized countries.

(e) The Enterprise

The Enterprise - the operating arm of the Authority - in charge of direct participation in the activities in the Area, is a real innovation as far as the institutional organization of the Authority is concerned. The Enterprise, through which all states parties to the Convention shall participate in the activities in the Area, has always been considered as the political symbol of the Group of 77 in the negotiations concerning the legal regime of the deep sea-bed. As such, and because of its commercial nature, it was the intention of the Group of 77 to make it as self-reliant, viable and strong as possible. The acceptance of the Parallel System of exploitation by the Group of 77 was indeed based on the assumption of the efficiency of the Enterprise.[134] The deep sea mining states, on the contrary, sought to weaken its capabilities and position against its potential competitors, namely, the deep sea mining consortia. The provisions of the Convention dealing with the Enterprise shall be read under the balance of these two contradicting views of the developed and developing states.

As mentioned before, the Enterprise is not a "principal organ" of the Authority, but it is not a subsidiary body either.[135] Because of its unprecedented character, it has a sui generis status. Its main purpose is to carry out, on behalf of the Authority, and thereby on behalf of mankind as a whole, activities in the Area "as well as transporting, processing and marketing of minerals recovered from the Area".[136] It can also enter into joint arrangements including joint ventures or production sharing with contractors.[137]

The legal status, privileges and immunities of the Enterprise, although set forth in the Convention, cannot be asserted independently, and their recognition may be subject to special agreements between the Enterprise and the states parties in whose territories the former has some sort of activities or representation.[138] The legal capacity of the Enterprise extends to the limits necessary for the exercise of its functions and include:

> (a) to enter into contracts, joint arrangements, including agreements with States and international organizations;
> (b) to acquire, lease, hold and dispose of immovable and movable property;
> (c) to be a party to legal proceedings. 139

The Enterprise, as a commercial entity and with such a broad legal capacity, shall exist "within the framework of the international legal personality of the Authority".[140] The property and assets of the Enterprise shall be immune from any form of seizure unless otherwise ruled by a final judgment against the Enterprise.[141] Besides, the Enterprise shall enjoy in the territory of states parties all rights, privileges and immunities accorded by the states parties to entities conducting similar activities in their territories.[142] The Enterprise is entitled to

negotiate with the host countries for exemption from direct and indirect taxation.[143]

The Enterprise is subordinate to the Council. Although it enjoys autonomy in the conduct of its operations, it shall act in accordance with the Convention and the rules, regulations and procedures of the Authority, as well as the general policies established by the Assembly, and shall be subject to the directives and control of the Council.[144] It is clear that the Enterprise's autonomy, which is an essential element for the achievement of its economic objectives, has strict limits established by the controlling powers of the Authority.

Compared to other organs of the Authority, the Enterprise has a relatively simple structure. The Enterprise shall be composed of a Governing Board, a Director-General and the staff necessary for the exercise of its functions.

The Governing Board shall consist of 15 members elected by the Assembly according to the principle of equitable geographical distribution for a period of four years with the possibility of re-election. In nominating the candidates, the need for the highest standard of competence and qualifications in the relevant fields shall be considered.[145] Two-thirds of the members shall constitute a quorum and the decisions shall be taken by a simple majority.[146] The Governing Board is in charge of directing the operations of the Enterprise which include, inter alia, submitting plans of work to the Council, submitting applications for production authorization, authorizing negotiations for the acquisition of technology or entering into joint ventures, borrowing funds and entering into legal proceedings.[147] Because of the composition of

the Governing Board, which includes experts in a personal capacity and not Government representatives, the Enterprise is the only non-intergovernmental organ of the Authority.

The Director-General of the Enterprise is to be elected by the Assembly further to the nomination of the Governing Board and the recommendation of the Council. His term of office may be up to five years, with the right to be re-elected for further terms.[148] He is the chief executive of the Enterprise "and shall be directly responsible to the Board for the conduct of operations of the Enterprise".[149] In the selection of the staff, the principle of equitable geographical distribution is subject to "the necessity of securing the highest standard of efficiency and the technical competence".[150] The Director-General, members of the Governing Board and the staff all discharge their duties in a personal and independent capacity, and "they shall not seek or receive instructions from any government or from any other source external to the Enterprise".[151] The simple structure of the Governing Board in the form of a limited membership and a simple decision-making procedure has been designed to ensure the efficiency of the Enterprise.[152]

In order to carry out its functions, the Enterprise is in need of capital, technology and management. Lack of these elements is the inherent weakness of the Enterprise as a commercial body. To defeat these shortcomings, the Convention has provided for a mechanism to assist the Enterprise to start its activities. Apart from the obligation of all state or private companies which apply for a mining contract to transfer their technology to the Enterprise,[153] the latter may directly buy this technology if it is

available on the open market, and also procure goods and services that it does not possess and which are required for its operation.[154] An equally important issue is the question of financing the Enterprise operations. The lengthy Article 11 of the Statute of the Enterprise deals with this matter. The major source for financing the activities of the Enterprise, at least in the initial stages, is the loans it may take. The amount of these borrowings should be approved by the Council.[155] The Convention has also set forth special provisions for financing the activities of the Enterprise in its first mine site as well as transporting, processing and marketing the minerals recovered therefrom.[156] The Convention puts emphasis on the purely commercial and non-political character of the Enterprise. It is specifically pointed out that the decisions of the Enterprise should be taken with regard to commercial considerations only.[157]

In short, it may be observed that, although because of probable immunities and exemptions, its affiliation with the Authority, its symbolic importance as the operating arm of the Authority acting on behalf of and for the benefit of mankind, the Enterprise as a mining entity may stand in a position superior to that of other multinational mining companies. Its main weaknesses, such as lack of necessary capital, technology and management, and its subordination to the control of the political organs of the Authority, can hardly render it an efficient competitor to the other miners. This is more true in the initial period of the activities of the Enterprise when it is heavily dependent on the technology of other miners and the capital to be financed by the states parties or through loans guaranteed by them.

We share the view of Paollillo that:

> It will not be an easy task to launch a new entity subject to the policies and guidelines dictated by international political bodies, to compete in a field of commercial and industrial activities that even now is not very well known by enterprises that have been researching and operating for years in the field. Financial and technological aids devised in the Convention will be palliatives to mitigate the Enterprise's many shortcomings. 158

(f) The Secretariat

The Secretariat is a principal organ of the Authority.[159] It is composed of a Secretary-General as the chief administrative officer of the Authority and such "qualified scientific and technical and other personnel as may be required to fulfil the administrative functions of the Authority".[160] The Secretary-General shall be elected by the Assembly upon the proposal of the Council for a period of four years with the possibility of being re-elected.[161] The Secretary-General and the staff of the Secretariat, by virtue of their positions in a "principal" organ of the Authority, possess international status, and as such "shall not seek or receive any instructions from any government or from any other source external to the Authority".[162] They also have, like the members of the Economic Planning Commission or the Legal and Technical Commission, the obligation not to disclose "even after the termination of their functions . . . any confidential information coming to their knowledge by reason of their employment with the Authority".[163]

Among the specified functions of the Secretary-General are submission of an annual report to the Assembly on the work of the

Authority and making arrangements "for consultation and co-operation with international and non-governmental organizations on matters within the competence of the Authority".[164] What is noteworthy is that the functions of the Secretariat are limited in comparison to the traditional role of secretariats in other international organizations. One typical function of the Secretariat - the supervision of compliance of obligations burdens upon the member states - which was entrusted to the Secretariat in the ISNT of 1975,[165] and could give a more significant role to that organ, was later transferred to the Council.[166]

SECTION IV: SETTLEMENT OF DISPUTES RELATING TO THE SEA-BED ACTIVITIES IN THE AREA

The special system of settlement of disputes arising from the activities in the Area is a part of the general disputes settlement of the Convention. It is thus relevant to briefly examine the general aspects of the latter before the former can be studied in detail.

(a) Disputes Settlement System in the Law of the Sea Convention

1. Development of the system in the United Nations

The variety of interests, both national and international, and the possibility of the conflict of these interests through the acts of the users of the sea, has rendered the sea a potential source of dispute. Being aware of this fact, the First United Nations Conference on the Law of the Sea 1958 made an effort to adopt a compulsory disputes settlement system for the states parties to any of the four conventions resulting from the Conference. The Convention on Fishing and Conservation of the Living Resources of the High Seas contained in Articles 9 to 12 few procedures on the settlement of disputes. In addition, the main disputes settlement system was excluded into an Optional Protocol which was supplemented to the four Conventions.[167] The ICJ arbitral tribunals and conciliation procedure were designated by the Protocol as tools for the settlement of disputes arising out of the interpretation or application of any of the four Conventions except where the special procedures of the Convention on Fishing were applicable. The 1958 Optional Protocol did not attract many states at that time and, therefore, no practice can be referred to that protocol with respect to dispute settlement.

When, in 1970, the General Assembly decided that the UNCLOS III would convene in 1973, the need for the incorporation of a comprehensive compulsory system of disputes settlement in the treaty resulting from the Conference was acutely felt.[168] The fact that

the future convention would not only modify or update the existing rules of international law, but also create new rules entailing rights and duties in areas of great economic interest for states, had lent even more importance to the creation of comprehensive procedures including binding judicial settlements in the Convention. Moreover, the establishment of a new international organization of the sort advised by the G77 and in the field of direct economic and political importance to industrialized countries could produce even more conflicts, and made access to a compulsory disputes settlement method indispensable.[169] The Declaration of Principles, as the first comprehensive international document to the international regime of the deep sea-bed area, contained a vague reference to the disputes settlement system according to which resolution of disputes was to be with regard to Article 33 of the Charter of the United Nations or another method to be agreed upon in the international regime to be established.[170] Thus, the option, at least as far as the legal international regime of the deep sea-bed area was concerned, was either judicial settlement by the ICJ or another method of settling disputes to be included in the new regime.[171] Several delegations to the Sea-Bed Committee, both in 1970 and 1971, made proposals concerning the disputes settlement,[172] but the discussion about it was held before the start of the work of the UNCLOS III.

Disputes settlement was not included in the mandate of any of the three Main Committees of the Conference. In the first substantive session of the UNCLOS III in Caracas, 1974, a group of delegations formed an Informal Working Group on Settlement of Law of the Sea Disputes. The initial basis of the deliberations of this

group was a proposal submitted by the United States to the Sea-Bed Committee.[173] The result of the discussions at this forum, which was submitted to the Conference at the end of the session, highlighted the common points of view of the participating delegates concerning disputes settlement procedures. The main point of the expressed opinions was the need for a compulsory disputes settlement system for the uniform interpretation of the Convention, and the indispensability of the incorporation of this system, as an integral part, into the Convention.[174]

The Informal Working Group continued its work in 1975, and produced a document containing 17 articles to be submitted to the Conference. In this document, procedures for non-compulsory and compulsory disputes settlement were included. The ICJ, the international court of the law of the sea and an arbitral tribunal were named in this document as appropriate fora for the compulsory settlements. The fact that the parties to disputes could be states as well as international organizations and even individuals made it necessary to establish a new international tribunal different from the ICJ,[175] the contentious jurisdiction of which is restricted under its statute to states.

At the end of the 1975 Geneva Session of the Conference, on the basis of the above-mentioned document, the President of the Conference produced an Informal Single Negotiating Text on Settlement of Disputes,[176] with the intention of placing it as the basis for future discussion at the Conference. At the same time, the question of the settlement of disputes relating to the sea-bed area was dealt with at the First Committee of the Conference. The ISNT, prepared by the Chairman of the First Committee, contained

provisions for the establishment of a tribunal as a principal organ of the Authority[177] with the jurisdiction for the interpretation and application of the Convention and the contracts.[178]

In 1976, the general debate in the Conference on the question of disputes settlement was held on the basis of the text prepared by the President, and as a result of discussions, a revised text on the disputes settlement procedures was produced which was incorporated into the RSNT. At this time there was general agreement that the states parties to the Convention and their entities, on the one hand, and the Authority, on the other, should have the right to bring any breach of the Convention or the contracts before a tribunal with binding powers.[179] Besides, expressed views were in favour of a general obligation to submit any disputes relating to the interpretation and application of the Convention to judicial settlement.

The question of dispute settlement was left open for discussion in the following session of the Conference, and except for the settlement of disputes relating to the activities in the Area, which was specifically discussed at the First Committee, the features of the general disputes settlement methods were touched upon by all delegates in the different fora. In this respect, mention should be made in particular of the Group of Legal Experts on Disputes Settlement chaired by Harry Wuensche from the German Democratic Republic.

With respect to the disputes concerning the sea-bed, the G77 was in favour of compulsory machinery provided a reasonable limitation was to be imposed on the competence of the International Tribunal for the Law of the Sea so that the implementation of such a

system would not lead to the substitution of the discretion of the Authority for that of the Tribunal. To minimize this fear, the ICNT included a condition based on the formulation prepared by Jens Evensen, which reads:

> The Sea-Bed Disputes Chamber shall have no jurisdiction with regard to the exercise by the Assembly or by the Council or any of its organs of their discretionary powers under this Part of the present Convention, in no case shall it substitute its discretion for that of the Authority. 180

The agreement on the need to incorporate a general compulsory judicial settlement system in the Convention was, from the start, conditioned to the exclusion of certain sorts of disputes as exceptions. The underlying reason for such a condition was the possible conflict of tribunal jurisdiction which could occur in the case of disputes relating to the exercise of rights and duties of the coastal states in areas under their jurisdiction. In the EEZ, for example, the coastal states exercise sovereign rights in respect of the management of living and non-living resources, and foreign flag states enjoy, inter alia, the freedom of navigation and overflight.[181] The possibility exists that in the case of certain disputes, the decision as to the choice of the tribunal will prove to be difficult.

The agreement on the need for the compulsory disputes settlement system was not, however, based on the acceptance of the exceptions only. It rested on, as Jaenicke has briefly put it, the fact that, firstly, this "compulsory nature of dispute settlement procedures . . . is limited to dispute about the interpretation of the Convention, that is to disputes about the interpretation of a written law" which lacks "the uncertainty with respect to the contents of unwritten international law", and secondly, both the

coastal states and the Authority are vested with comprehensive regulatory and administrative powers by the Convention, and the endowment of such broad powers could be accepted by major naval powers only if both coastal states and the Authority could be kept within well-defined limits and in case of dispute made subject to juridical review.[182]

Because of this basic agreement, negotiating the disputes settlement system was relatively easy and even sea-bed disputes settlement procedures, which were of chief significance for both the prospective sea-bed mining states and the G77, were adopted without complications.

In the Convention, the disputes relating to the use of the seas have been put into two major categories: sea-bed and non-sea-bed disputes. The first category includes the disputes concerning the activities in the Area. The second category consists of disputes between states parties in relation to the exercise of their rights in different maritime zones.

2. Types of fora

The Convention has clearly provided for two disputes settlement systems. Part XV, comprising Articles 279 to 299, is devoted to the settlement of disputes related to the law of the sea in general. Deep sea-bed disputes settlement is regulated by the provisions of Section 5, Part XI of the Convention. To accommodate the desire of the majority of states, the Convention, in addition to non-compulsory procedures such as negotiations or conciliations,[183]

envisaged a flexible method for the choice of forum for compulsory judicial settlement.

As far as the non-sea-bed disputes are concerned, any party can choose one or more options between the ICJ, the International Tribunal for the Law of the Sea and general or special arbitration procedures.[184] Such a choice should be made in writing and at the time of signing the Convention and depositing the instrument of ratification or accession to it.[185] In the event the parties to the dispute have chosen different procedures or a party has made no choice, the dispute would have to be submitted to general arbitration.[186]

The general arbitral tribunal, consisting of five members, can deal with any disputes relating to the interpretation or application of the Convention, but if such disputes are related to those provisions of the Convention which concern fisheries, protection and preservation of the marine environment, marine scientific research, or navigation, a special arbitration procedure may be employed.[187]

The Convention has also provided for the establishment of a permanent organ, the International Tribunal for the Law of the Sea, composed of 21 judges representing the principal legal systems and geographical regions of the world.[188] The judges shall be elected by a conference of the states parties to the Convention for a period of nine years.[189]

Originally, the idea was to establish such a tribunal with jurisdiction over disputes concerning activities in the Area as an integral part of the Authority, and Article 24 of the ISNT reflected this view by legislating the tribunal as one of the principal organs of the Authority. The suggestion was dropped from later negotiating

texts on the ground that such an arrangement may disturb the independence of the Tribunal from the Authority, which could itself become a party to the disputes. Instead, the establishment of the Tribunal for all disputes and one of its specialized chambers for the sea-bed mining disputes was provided for.[190]

To moderate the anxieties of those who had reservations concerning the submission of disputes to permanent courts like the ICJ or the Law of the Sea Tribunal, and in order to make the disputes settlement system even more flexible and thereby facilitate the acceptance of submission of disputes to binding judicial settlement, it is laid down in Article 15 of Annex VI of the Convention that the Law of the Sea Tribunal may set up three different sorts of chambers.

A special chamber, composed of three or more of the Tribunal members, may be formed to deal with particular categories of disputes. If the parties to a particular dispute wish to have their case dealt with by a chamber of the Tribunal, an ad hoc chamber for that purpose shall be formed by the Tribunal. Besides, the latter should annually form a summary procedure chamber composed of five of its members in order to hear and determine disputes by summary procedures. The submission of disputes to any of these chambers is subject to the request of the parties.[191]

In order to deal with the disputes relating to the activities in the Area, the Tribunal shall establish an independent permanent and specialized forum, the Sea-Bed Disputes Chamber.[192]

The comprehensiveness, diversity and the great novelty of subjects included in the Convention have led to the adoption of a broad and generalized language which in itself may give rise to

divergent interpretations. The vague formulation of many provisions of the Convention, which is the result of efforts to command consensus, runs counter to "the notions of clarity, certainty and finality of the law".[193] These unavoidable deficiencies will generate ample opportunity for the emergence of disputes. The compulsory submission of disputes to the ICJ, the Law of the Sea Tribunal or any of its chambers and arbitration, as set out in the Convention, is a flexible and realistic approach to this controversial issue. It is hard to believe that any other arrangement could win the consent of the states parties to the Convention and at the same time could yield a workable solution. The risk of dissimilarity of interpretation and application of the Convention because of the multiplicity of fora surely exists.[194] Nevertheless, one may expect that, because of its novelty, the Law of the Sea Tribunal will become the main forum and, in that case, the main policy in respect of the interpretation and application of the Convention will be set by that organ. This is more probable, since in the majority of other fora, and particularly in chambers, the members of the Tribunal shall participate. Moreover, the exclusive jurisdiction of the Sea-Bed Disputes Chamber with respect to the disputes relating to activities in the Area "could ensure continuity in the interpretation and application of the international law governing the Area".[195]

(b) Disputes relating to the Activities in the Area

The need to establish a special compulsory disputes settlement system for the disputes arising from the conduct of activities in the Area rests in the fact that activities in the Area are regulated not only by the rules enumerated in Part XI of the Convention and relevant Annexes III and IV, but also by the rules, regulations and procedures to be adopted by the Authority. In other words, one of the operators of activities in the Area has the attributes of law-making at the same time as it can directly engage in the conduct of activities in the same way as states parties or their entities, i.e. juridical or natural persons, can. This unprecedented legal order, in which the legislator is simultaneously one of the subjects of law, may generate many disputes between the Authority and other subjects. It, therefore, calls for the creation of a specialized judicial organ with competence and concentration on specific issues related to sea-bed mining in order to, firstly, ensure the development of a unified body of jurisprudence and, secondly, to guarantee the right of access for all entities engaged in deep sea-bed mining, including private persons, to international adjudication in case of conflict.

Section 5 of Part XI of the Convention, containing Articles 186 to 191, deals with the question of setting up a special dispute settlement system for the disputes arising from activities in the Area. This system provides for the necessary judicial institutions, the scope of their jurisdiction, the applicable law and procedure. The components of the system shall be examined in the following.

1. Institutions

The main organ for the settlement of disputes relating to the activities in the Area is the Sea-Bed Disputes Chamber which has an organic connection with the International Tribunal for the Law of the Sea, but is at the same time a permanent independent body. The 11 judges of the Chamber, elected by and from among the members of the Tribunal and in accordance with the principle of the representation of the principal legal systems of the world and equitable geographical distribution, shall hold office for three years with the possibility of being elected for a second term.[196]

In line with the general policy for establishing a flexible disputes settlement system for the Convention, and in view of the fact that the nature of disputes related to the activities in the Area is characterized by both technical and commercial complexities, it was felt necessary, at least on the part of some industrialized countries, to provide for the access to smaller and more effective and speedy procedures such as arbitration. Thus, the Convention has, in addition to the Sea-Bed Disputes Chamber, envisaged the use of a special chamber of the Tribunal, or an ad hoc chamber of the Sea-Bed Disputes Chamber, or a commercial arbitral tribunal for the settlement of disputes concerning activities in the deep sea-bed.[197] The special chamber of the tribunal, as mentioned before, may have three forms with a composition of three or more members from among the judges of the Tribunal.

The ad hoc chamber of the Sea-Bed Disputes Chamber shall be composed of three members from among the judges of the Chamber. These judges shall be appointed by the Chamber with the approval of

the parties to the dispute. In the case of disagreement about the composition of the ad hoc chamber, the parties may each appoint one judge who shall together agree on the third member. In any case, the President of the Sea-Bed Disputes Chamber has the final word in the solution of problems concerning the composition. Judges of the ad hoc chamber may not be the nationals or in the service of any of the parties to the dispute.[198] Due to the extensive role of the parties to the dispute in the determination of the composition of the ad hoc chamber, it may be considered more or less similar to arbitration.

The parties to a dispute arising from the interpretation or application of a contract are enjoined by Article 188(2)(a) of the Convention to submit their dispute to a commercial arbitral tribunal, the composition of which is not regulated in the Convention, and is in any event expected to be subject to the terms of the contract agreed by the parties.

2. Scope of jurisdiction

Riphagen has rightly said that "the jurisdiction of the Sea-Bed Disputes Chamber . . . is rather more in the nature of a legal control of the international management conducted by the Authority than of an 'adjudication' between equal parties".[199] This so-called legal control may entail a non-binding or binding review of the Authority's acts or omissions. The advisory opinion of the Sea-Bed Disputes Chamber and the contentious procedures before that organ represent the said legal control methods respectively.

i Advisory opinion

The Convention contains two different procedures for requesting advisory opinions from the SBDC. On the first procedure, both the Assembly and the Council may request the SBDC to give advisory opinions on legal questions arising within the scope of their activities.[200] Such a request can be made at any time, and the Chamber is to treat it as an urgent matter. This is a general procedure according to which any legal matter relating to the activities of the Assembly or the Council can become subject to advisory opinion.

On the second procedure, which is a restricted one, only the Assembly may request the advisory opinion of the Sea-Bed Disputes Chamber on the conformity with the Convention of a proposal before the Assembly concerning any matter. The sponsorship of at least one-fourth of the members of the Authority in the form of a written request addressed to the President is required to submit the proposal to the SBDC for advisory opinion. Voting on the proposal shall be deferred until the Chamber has pronounced its opinion.[201]

ii Contentious procedure

The more important part of the Sea-Bed Disputes Chamber's jurisdiction - the second category - concerns contentious procedures. These procedures may generally be divided into two groups: cases arising from disputes between states parties, and cases to which the Authority or the Enterprise on the one hand, and a state party or private entity on the other, are parties.

Disputes between states parties concerning the interpretation or application of Part XI of the Convention and its related annexes

are under the jurisdiction of the Sea-Bed Disputes Chamber.[202] Although the need to secure a uniform and coherent interpretation of the Convention required the limitation of the number of judicial organs to as few as possible, the urge for flexibility of choice which prevailed in the provisions of the general disputes settlement system contained in Part XV of the Convention necessitated the provision for the same flexibility in the case of sea-bed mining disputes between states parties. The result was the arrangement contained in Article 188(1), according to which such disputes may be submitted either to a special chamber of the Law of the Sea Tribunal or to an ad hoc chamber of the Sea-Bed Disputes Chamber. This compromise arrangement may ease the flexibility of choices, but it is doubtful if it can ensure the uniformity of interpretation or application of Part XI of the Convention. The fact that parties to the disputes may play an essential role in the determination of the composition of the special or ad hoc chambers may render the result of the work of these organs, and particularly that of the special chamber of the Tribunal, different from those of the SBDC itself.[203]

Disputes between the Authority and states parties (or state or private entities) can be divided into non-contractual and contractual cases. The non-contractual disputes are between the Authority and a state party and are concerned with the interpretation and application of the Convention. These disputes may have three causes: 1- acts or omissions of the Authority or a state party in violation of Part XI; 2- performance of acts by the Authority which are in excess of its jurisdiction; and 3- misuse of powers by the Authority.[204]

Acts or omissions of the Authority seem to have a broad implication, meaning a reference to the acts and omissions of all organs of the Authority. That includes those acts of the Enterprise which may be related to the interpretation or application of the Convention.[205] In these cases, because one party to the dispute is the Authority, no freedom of choice in regard to the judicial procedure is provided for, and the SBDC has exclusive jurisdiction.

The jurisdiction of the SBDC in regard to non-contractual cases has two limitations. According to Article 189, the Chamber cannot declare invalid the rules, regulations and procedures of the Authority, nor can it pronounce itself on the question of their legality.[206] Under this article there is no explicit designation of discretionary power to the Authority and the freedom of actions of the Authority is reduced by the principles and rules enumerated in Part XI of the Convention and related annexes. In other words, there is no specific definition for the term discretionary powers in the Convention. In fact, this is the practice of all other organs which act within the context of a specific legal order.[207] What may be considered as the discretionary powers of these organs "is a margin of choice in the form of, inter alia, determination of the timelines or advisability of taking a certain act".[208] Exclusion of a decision taken by the Authority in the exercise of its discretionary powers from the jurisdiction of the SBDC was not controversial and was "in line with the corresponding practice in the national legal systems",[209] but its inclusion in Article 189 seems to be superfluous, because:

> . . . an act carried out in the exercise of a discretionary power of the Authority - a power the exercise of which is not subject to any legal regulation - cannot by definition be subject to jurisdictional review of legality, because it lacks the legal framework to which its legality would be referred. 210

The second limitation is in respect of the judicial review of the rules, regulations and procedures of the Authority. Any allegation by a state party to the effect that a particular act of the Authority is contradictory to the Convention, is in excess of its jurisdiction or is a misuse of power, puts in question the legality of the rules, regulations and procedures which constitute the legal basis of such an act.[211]

The imposition of such a limitation was the subject of controversy between the G77 and the industrialized countries. It was generally the position of the industrialized countries that the system of legal control of the rules, regulations and procedures of the Authority shall be formed in accordance with the judicial review system of the EEC. The Court of Justice of the EEC is competent to review the legality of acts of the Council and the Commission of the EEC, and declare them null and void in the event it found those acts illegal "on grounds of incompetence, of errors of substantial form, of infringement of this Treaty or of any legal provision relating to its application, or of abuse of power".[212]

The developing countries were against the idea of giving the Sea-Bed Disputes Chamber the competence of checking the compatibility of decisions of the Authority with the constitution, i.e., Part XI of the Convention, and allowing the SBDC to declare invalid the rules, regulations and procedures upon which a particular decision is taken. They argued that such an attribution

would run counter to "the sanctity and intangibility of the powers of the Authority".[213] They also contended that the decisions of the Assembly and the Council were adopted by the representatives of sovereign states, and the result was quasi legislative acts which could not logically be subject to judicial decisions.[214] The compromise solution, as incorporated in Article 189 of the Convention, confines the juris- diction of the Chamber to:

> . . . deciding claims that application of any rules, regulations and procedures of the Authority in individual cases would be in conflict with the contractual obligations of the parties to the disputes or their obligations under this Convention.

Thus, the Chamber may not declare the rules, regulations and procedures of the Authority invalid, but it may decide if the application of any such rule in the individual case before it could conflict with the duties of the parties under the Convention or the contract. In other words, the Chamber does not declare the act "invalid", but not applicable in a particular case. To compensate the injuries suffered by the claimant because of such a decision of non applicability, the Convention has endowed the Chamber with rather broad competence. The Chamber, therefore, may decide claims for damages to be paid or other remedy to be given to the party concerned for the failure of the other party to comply with its contractual obligations or of its obligations under this Convention.[215]

The main question which arises in reading Article 189 is how the SBDC may possibly declare a decision of the Authority non-applicable in a particular case without first pronouncing the rules, regulations and procedures upon which such a decision is taken incompatible with the Convention and therefore illegal. It

seems that the Chamber may not abstain from examining the rules, regulations and procedures of the Authority, but when it finds an individual decision is contrary to the Convention, it may not only adjudicate the damage but also "grant other types of relief, including, it is believed, injunctions preventing the application or further application of the unlawful decision or measure".[216] This conclusion is derived, inter alia, from the fact that:

> the judicial review system set up under Article 187(b) and 189 would be pointless if, subject to the duty to pay damages, the Authority were at liberty to disregard or to go on disregarding the restrictions imposed by Part XI on its regulatory powers. 217

We can sum up by saying that the search for conciliating the anxieties of the industrialized countries and their individuals for protection against any arbitrary decision of the Authority in conflict with the principles of Part XI, and the efforts of the G77 in safeguarding the integrity of the Authority and the sanctity of its powers, resulted in the adoption of the ambiguous and vague formulation of Article 189 which gives room for divergent interpretations of the real limits on the jurisdiction of the SBDC.

Contractual disputes which constitute the second group of contentious cases arise between the Authority and the public or private entities in respect of application or interpretation of the contracts. These disputes can be divided into three groups.

The first group comprises those disputes for the settlement of which the SBDC has exclusive jurisdiction. These disputes may relate to: the refusal of a contract to a prospective contractor who has fulfilled all the necessary conditions set out in Articles 4(6) and 13(2) of Annex III of the Convention;[218]

acts or omissions of a party to a contract relating to the activities in the Area and directed to the other party or directly affecting its legitimate interests;[219] and the liability of the Authority pursuant to Annex III, Article 22.[220]

The second group includes the disputes related to the contracts, the settlement of which is under the exclusive competence of a commercial arbitral tribunal. Disputes arising from: the financial terms of the contract;[221] those related to the fairness and reasonableness of the commercial terms; and conditions offered by a contractor for the transfer of technology,[222] fall into this group.

The third group consists of those disputes which may fall under either the exclusive jurisdiction of the commercial arbitration tribunal or both such tribunal and the SBDC. This group consists of disputes arising from the interpretation and application of contracts.

While in the case of disputes between the Authority and a State Party concerning the interpretation and application of the Convention, the jurisdiction of the SBDC is meant to be exercised principally as a measure to protect the supposedly weaker party, i.e., the State Party, against the alleged illegal decisions of the stronger party, i.e., the Authority. Disputes between the Authority and the Enterprise, on the one hand, and state enterprises and natural or juridical persons sponsored by states, on the other, are, in fact, to be considered as between two equal parties of a commercial contract.

The G77 believed that, since these commercial contracts are to be concluded in accordance with the dictates of the Convention and

the rules, regulations and procedures of the Authority, settlement of disputes regarding their interpretation and application should fall within the scope of the exclusive jurisdiction of the SBDC. The industrialized countries, not only because of a general reluctance to submit disputes involving private persons and enterprises to a permanent international tribunal whose competence normally extends to the traditional subjects of international law and whose composition is probably characterized by the predominant representation of the judges from the Third World, but also with respect to the nature of such disputes which require, inter alia, speedy solution, insisted on the submission of these disputes to commercial arbitration which is a standard tool of international trade law.[223]

From these two divergent views a compromise formula was worked out which is now included in Article 188(2) of the Convention, and provides for the automatic submission of these disputes to commercial arbitration unless a specific agreement to the contrary is made between the parties.[224] As a counter balance to this automatic and guaranteed access of the mining companies to commercial arbitration, the securing of which was the main concern of the industrialized countries, the Convention imposes an important limitation on the jurisdiction of the arbitral tribunal by prescribing that such a tribunal:

> . . . shall have no jurisdiction to decide any question of interpretation of this Convention. When the dispute also involves a question of the interpretation of Part XI and the Annexes relating thereto, with respect to the activities in the area, that question shall be referred to the SBDC for a ruling. 225

The G77 held the view that a uniform interpretation of the Convention required the concentration of all disputes related to such interpretation in one forum - the SBDC. Therefore, it was unacceptable to them to leave the settlement of disputes concerning the interpretation of the contracts which might entail the interpretation of the Convention as well to the exclusive jurisdiction of an arbitral tribunal. The decision as to whether a particular question falls into the category of Convention interpretation or relates to a contract interpretation is to be taken by the arbitral tribunal either at the request of each party or proprior motu.[226] In the event it is decided by the said tribunal that a question related to the interpretation of the Convention should be submitted to the SBDC, it shall wait for the decision of the Chamber, and then "render its award in conformity with the ruling of that Chamber".[227]

The compromise solution, which seeks to reconcile the requirement of uniformity of the interpretations of the Convention provisions with the need for the speedy and effective solution of disputes relating to the interpretation of the contracts, suffers from a complex drawback, namely, the vague line of distinction between Convention interpretation and contract interpretation. The exclusive competence to draw this distinction is conferred upon the arbitral tribunal. The exercise of this competence may depend on the contents of the contract, and whether it contains provisions for its interpretation, or whether it lacks or includes references to any general or specific provision of the Convention, etc. This lack of clarity as to the basis on which the arbitral tribunal shall determine whether or not a question should be submitted to the Sea-Bed Disputes Chamber may put in question the extent of the

jurisdiction of this tribunal in each individual case. Such vagueness will certainly not contribute to the adoption of a speedy decision.

3. Procedures and applicable law

As demonstrated in the preceding section, the majority of the disputes related to the activities in the Area may fall under the jurisdiction of the SBDC, or may be referred to commercial arbitration.[228] While the procedures in these two instances are different, the possibility of access to them is identical.

As regards the first group of disputes, any party may submit the dispute to the Chamber. The same is true in the case of the second group, but in this case there exists also the possibility that the dispute shall be referred to another forum if both parties so agree.[229]

It may be noted here that one of the main characteristics of the SBDC is that both states and entities other than states and private persons have access to it.[230] When one of the parties is a natural or juridical person, the sponsoring state shall have the right to participate in the proceedings. In cases like this, if one of the parties is a state party, it may request the sponsoring state of the other party to appear in the proceedings on behalf of that person. Failure to appear will give the right to the former to be represented by a judicial person of its nationality.[231]

The procedure of the SBDC Chamber is the same as the one applied to the International Tribunal for the Law of the Sea.[232] That means that procedural rules concerning, inter alia,

the institution of the proceedings, provisional measures, hearings, conduct of case, judgement, intervention and costs, as enumerated in Section 3 of Annex VI of the Convention, shall apply to the Chamber too.

Arbitral tribunals dealing with disputes relating to the undertaking of contractors to transfer technology to the Authority under fair and reasonable commercial terms and conditions shall conduct the arbitration according to the arbitration rules of the United Nations Commission of International Trade Law (UNCITRAL), or "other arbitration rules as may be prescribed in the rules, regulations and procedures of the Authority".[233] In case of interpretation or application of the contract or its financial terms, the parties to the dispute may agree, in the contract, on a special arbitration procedure. In the absence of such an agreement, the same arrangement as in the case of disputes relating to technology transfer shall be applied.[234]

Article 293 of the Convention stipulates that the law applicable for the settlement of disputes in the framework of the general disputes settlement system of the Convention shall be the Convention and other rules of international law not incompatible with this Convention. This formulation suggests that the provisions of the Convention are the prime source of law to be applied in the settlement of disputes, and recourse to other rules of international law can be had only in the event of a gap in the Convention.[235]

When the dispute concerns the interpretation and application of the contracts or the rules, regulations and procedures of the Authority, the terms of the contract shall be taken into consideration. The precedence in the applicable laws in this case

is with the terms of the contract, the rules, regulations and procedures of the Authority, and the rules of international law compatible with the Convention.[236]

In all cases, except for questions related to the interpretation and application of contracts, parties may agree that the disputes shall be decided by the competent court ex aequo et bono.[237] Nevertheless, in the case of the interpretation of a Convention provision in relation to the settlement of a dispute raised from the interpretation and application of a contract, it seems improbable that, even by the agreement of the parties, the SBDC may have recourse to this approach, since deciding ex aequo et bono in this case in fact runs counter to the raison d'etre of the Chamber, which is securing a uniform interpretation and application of the Convention in respect of deep sea-bed mining.[238]

SECTION V: EVALUATION

The discussion on the International Sea-Bed Authority demonstrates that the Authority is in many ways a unique international organization. Its innovative purposes and functions and its power to legislate rules, regulations and procedures for the proper conduct of activities in the Area differentiate it from most other international organizations. Its main functions as representing mankind and conducting activities in the Area for the benefit of mankind necessitates the concentration of the real power in its plenary organ as the meeting place for the representatives of

the greater part of mankind. This has been the position of the G77, based on the principle of the common heritage of mankind. The power now is vested instead in the executive organ, the Council, which represents to some extent the "special interests" of states rather than the interests of mankind. This is close to the position which the industrialized countries adopted after they had succeeded in getting the Parallel System of exploitation accepted by the Group of 77.

The present composition, competence and functions of the Authority, as laid down in the Convention, is far from ideal for an international organization in charge of rational management of the resources of the Area for the benefit of mankind. To understand the compromise which produced the present structure of the Authority, it should be recalled that, for the G77, the Authority, as the agent of mankind, was the only entity with the exclusive right to manage the resources of the Area. The activities of state and private entities were, according to this group, subject to the discretionary powers of the Authority. For the industrialized countries, it was at most a necessary evil whose only legitimate function was to allocate sites and administer the minimum of regulation.[239] These differing positions gave rise to the controversy between the principle of sovereign equality of states and its ensuing one-state one-vote scheme, on the one hand, and the requirement of considerations to the designated economic interests of certain states, on the other. The same arguments, which resulted in the creation of the Parallel System of exploitation, rationalized a compromise in regard to the composition, competence and functions of the Authority.

The key words in both cases are "the balance of interests". This balance is meant to be achieved by providing for the one-nation one-vote process in the plenary organ of the Authority - the Assembly - and a rather unique three tier system of voting in the executive body - the Council. There are well-founded reasons to fear that the Council, because of its decision-making procedures, will end up with more or less the same fate as the Security Council of the United Nations. These procedures render "unlikely appropriate and timely decisions on important questions".[240] That is even more alarming if we remember that the decisions of the Council "will directly and significantly affect the rational management of the common heritage of mankind, the successful implementation of the system of exploration and exploitation and the security of investments in the sea-bed mining".[241]

Irrespective of the difference of voting procedures in the Council and the Assembly which is intended to protect the minority of industrialized countries against the imposition of the will of the majority of the developing states,[242] the powers accorded to the Council are far more than what was initially intended.

The Enterprise, although guaranteed of access, capital and technology, seems to be an ineffective commercial entity whose proper functioning is dependent upon many uncertain factors such as adequacy of funds and acquisition of efficient technology, the amount and quality of which may differ as a result of major industrialized countries staying outside the Convention, and the existence of an efficient management competitive with a private company. One may not expect that the Enterprise, being an international agency and under the control of the Council with

disputable decision-making procedures, would be able to compete with the state or private companies.[243]

The distribution of powers, the composition and the conditions for the execution of functions, all affirm the fact that the possibilities of the Authority to ensure the successful achievement of its purpose, i.e., the rational management of the resources of the Area for the benefit of mankind as a whole, either through its organizing and controlling functions or through its executive function, are limited, and the viability of the machinery in its present form is as doubtful as the Parallel System. It is left to see how and if the Preparatory Commission may, through the adoption of rules, regulations and procedures of the Authority, enhance the position of that organization by, inter alia, strengthening the powers of the Assembly, and give a fair chance to the Enterprise to operate as effectively as its competitors.

As it is now, the institutional aspects of the Authority suggest that its members will exercise effective control over it, and the execution of its functions and powers will meet many restraints either in the form of prescribed rules already in the Convention or the decisions to be adopted by one or other political organ. It is thus important that states parties, both through the Preparatory Commission and later through the political organs of the Authority, make efforts to turn this organization into a viable strong entity with the possibilities for achieving its purposes.

As regards the system of disputes settlement of the Convention, it is clear that the existing system is far from perfect. That holds true even for the sea-bed disputes settlement procedures. Looking from the viewpoint of mankind and its trustee, the

Authority, the system seeks to control the discretionary power of the Authority - which is an indispensable tool for the implementation of its duties through the imposition of strict rules and regulations which constitute a stiff legal framework for the acts of the Authority, and by giving locus standi to individuals and enterprises before the tribunals with competence to take binding decisions.

The agreement of the Parallel System of exploitation was with the anticipation that the participation of private and state enterprises as well as the Authority in the activities in the Area would certainly give rise to many disputes between those entities and the Authority. The industrialized countries succeeded in ensuring that the most important and probably the most frequent of these disputes, i.e., those related to the interpretation and application of contracts between the Authority and private or state enterprises, should be settled by commercial arbitration. In other words, disputes relating to the interpretation and application of the contracts are treated like any other commercial dispute, and the role of the Authority is equalized to the role of any individual. This is far from the position of the G77, which sought to put all disputes raised from the activities in the Area under the exclusive jurisdiction of the Sea-Bed Disputes Chamber.

The containment of the integrity and freedom of the Authority and the elevation of the status of the individuals before the competent tribunals are not the only drawbacks. That it is possible for the Sea-Bed Disputes Chamber to prevent a rule, regulation or procedure of the Authority by establishing its incompatibility with the Convention, seriously puts in question

the integrity of the Authority. These and other drawbacks notwithstanding, the result of the compromise between the G77 and the industrialized countries in respect to the sea-bed disputes settlement, seems to be a workable system. It may be workable because it is comprehensive and flexible; it is compulsory and leads to binding decisions; and it covers almost all sorts of possible disputes. The workability of the system may convince many hesitating states to ratify the Convention.

Footnotes - Chapter Six

1. UN Doc. A/C.1/PV.1516, p.1

2. UN Doc. A/7230, p.18, para. 5.

3. UN Doc.A/7477, para. 7(f). The draft resolution submitted by these countries to the First Committee of the General Assembly had the initials A/C.1/L.441.

4. UN Doc. A/7622, pp.102-14.

5. General Assembly Resolution 2574 (XXIV) of 15 December 1969.

6. UN Doc. A/AC.138/23.

7. For these alternative draft articles, see UN Doc. A/9021, pp.70-165.

8. See Ogley, op. cit., p.194.

9. In the view of the industrialized countries, the term "regime" signified a body of legal rules and principles which states had to adhere to in the deep sea-bed. See, e.g., UN Doc. A/C.1/PV.1602, para. 33 (Belgium).

10. UN Doc. A/C.1/PV.1678, para. 35.

11. UN Doc. A/AC.138/12, p.8; A/AC.138/23, p.9.

12. UN Doc. A/AC.138/SR.56, p.154.

13. UN Doc. A/AC.138/SR.23, p.54.

14. UN Doc. A/C.1/PV.1603, para. 54.

15. R. Galindo Poh, "Latin America's Influence and Role in the Third United Nations Conference on the Law of the Sea", 7 ODIL (1979), pp.65-87, at p.76.

16. UN Doc. A/AC.138/41, p.19.

17. The statement of the representative of Kenya in the 1970 session of the Sea-Bed Committee reveals this position in a lucid manner. According to him, the international organization ". . . should have full legal personality, with the right to make contracts, to acquire and dispose of property and to institute legal proceedings. It should also be itself liable to be sued, while enjoying privileges and immunities comparable to those of, for instance, the International Bank for Reconstruction and Development (IBRD). Its functions should include licensing, direct exploitation of resources, control of production (to avoid excessive price fluctuation), collection of fees and royalties, prevention of

pollution and implementation of training programmes". UN Doc. A/AC.138/SR.35, pp.71-72.

18. J.H.W. Verzijl, International Law in Historical Perspective, Vol. I, p.284. Leyden: Sijthoff, 1968.

19. The Bulgarian delegation to the Sea-Bed Committee made a distinction between intergovernmental and supranational organizations, and emphasized that the new institution should have the characteristics of the former because "states must play a predominant role in both the law-making process and the application of the rule of law". UN Doc. A/AC.138/SR.34, p.59 (Bulgaria).

20. The representative of Sri Lanka expressed the view that the future organization "would have jurisdiction only in the international area and a legal status similar to that of other specialized agencies of the United Nations". Off. Rec., Vol. III, p.56, para. 38 (Sri Lanka).

21. The industrialized countries held that carrying out mining activities in the deep sea-bed by an international agency would, inter alia, "(a) require a large initial capitalization; (b) meet, and even generate, conflicts in the marketing of its mineral products, since it would act as a producer and an exporter only and hence might influence prices under the pressure of the international community to return a profit, with unfavourable consequences; (c) present problems regarding the distribution of profits to investors vis-a-vis the international community; (d) present problems with respect to the use of patents and industrial or trade secrets; (e) force the international community into taking huge risks instead of allowing the risks to be taken by others and benefiting from success where it is achieved; (f) essentially deny to developing countries the benefits of service and supply industries surrounding the mining and refining activity, the technologic spill-over, social benefits coming from developing skills and knowledge, as well as manufacturing industries, while delaying at the same time their participation in sea-bed exploration. UN Doc. A/AC.138/23, pp.13-14.

22. See, e.g., Article 44(2)(a) of the Draft United Nations Convention on the International Seabed Area, a working paper submitted by the United States to the Sea-bed Committee in 1970, UN Doc. A/AC.138/25; Off. Rec., Vol. III, p.39, para. 28 (the Soviet Union). For the objection of the Soviet Union to a powerful international agency, see UN Doc. A/C.1/PV.1708, para. 165; A/AC.138/SR.36, p.95.

23. UN Doc. A/AC.138/31, Annex II, p.4.

24. UN Doc. A/C.1/PV.1683, para. 10.

25. UN Doc. A/C.1/PV.1680, para. 43.

26. UN Doc. A/AC.138/34, p.12. Nigeria and Kenya, e.g., were among those states which supported unrestricted power of exploitation for the international organization, while Fiji was of the opinion that the organization "should not exercise such power itself until it could finance the operations from its own resources". See UN Doc. A/C.1/P.1674, para. 92 (Nigeria); A/C.1/PV.1681, para. 146 (Kenya); Off. Rec., Vol. I, p.114, para. 52 (Fiji).

27. UN Doc. 138/82, p.3.

28. UN Doc. A/AC.138/41, p.27; some of the industrialized countries took the same position as the developing countries in this issue. Canada, e.g., said in the First Committee of the General Assembly that, "The proposed machinery, by virtue of the very nature of the task to be performed, should be a wholly new institution rather than one developed out of existing organs and agencies within the United Nation family"; UN Doc. A/C.1/PV.1779, para. 19.

29. Off. Rec., Vol. I, p.77, para. 85.

30. The Conference, aware of this silence, has assigned the Preparatory Commission to "make recommendations concerning the relationship between the Authority and the United Nations and other international organizations"; see Resolution II concerning the establishment of the Preparatory Commission, para. 5(d).

31. A.O. Adede, "The Group of 77 and the Establishment of the International Sea-Bed Authority", 7 ODIL (1979), pp.31-64, at p.33.

32. UN Doc. A/9021, pp.70-165.

33. Adede, op. cit., pp.33-34.

34. Ibid., pp.34-35; El Evrinades, "The Third World's Approach to the Deep Seabed", 11 ODIL (1982), pp.201-61, at p.233.

35. L. Juda, "UNCLOS III and the New International Economic Order", 7 ODIL (1979), pp.221-55, at p.244. In this context, it bears referring to Article 157(2) of the Convention which is intended to prevent any extensive interpretation of the powers of the Authority and its organs, in particular the Assembly, by specifying that the Authority's powers are those "expressly conferred upon it by the Convention".

36. See Evrinades, op. cit., p.233.

37. Adede, op. cit., p.35.

38. Although this was the general position of the developing countries in the first substantive session of the UNCLOS III in 1974, there were a number of different views. Kenya,

e.g., could think of six seats in a council of 48 members to be allocated to states with most advanced ocean technology; Off. Rec., Vol. II, p.20, para. 29.

39. See Evrinades, op. cit., p.233.

40. It bears noting that the acceptance of "special interests" considerations by the developing countries was with the understanding that these interests should be related to the deep sea mining and they do not include other economic or military interests. See B.H. Oxman, "The Third United Nations Conference on the Law of the Sea: the Seventh Session (1978)", 73 AJIL (1979), pp.1-41, at p.14.

41. Ogley, op. cit., p.200.

42. UN Doc. A/CONF.62/WP.8/Part I, Article 17(1). Paragraphs (a) and (b) of the same article describe the countries with special interests as comprising:
"(a) Six members with substantial investment in, or possessing advanced technology which is being used for, the exploration of the Area and the exploitation of its resources, and members which are major importers of landbased minerals which are also produced from the resources of the Area, provided only that at the first election at least one of these six members shall be from the Eastern (Socialist) European region.
(b) Six members from among the developing countries, one being drawn from each of the following categories:
(i) States which are exporters of landbased minerals which may also be produced from the resources of the Area;
(ii) States which are importers of the minerals referred to in subparagraph (i);
(iii) States with large populations;
(iv) Land-locked States;
(v) Geographically disadvantaged States;
(vi) Least developed countries."
Off. Rec., Vol. IV, p.142.

43. Evrinades, op. cit., p.233.

44. The group of states representing different interests included:
"1- four states with greatest investments in exploration and exploitation of the resources of the Area including at least one Eastern European country; 2- four major importers of the minerals in question, including one Eastern European country; 3- four major landbased exporters, including two developing countries; 4- six developing countries representing special interests. The remaining eighteen members were to be elected according to the principle of equitable geographical distribution". See UN Doc. A/CONF.62/WP.10, Article 159.

45. Evrinades, op. cit., p.262.

46. Report of the First Committee on the Work of Negotiating Group 3, N63/2, p.3.

47. It is believed that most of the seats for the Western European and other groups of states will be filled by states representing special interests. The smaller industrialized countries of the West are, therefore, estimated to have a chance of membership in the Council on the basis of geographical distribution once every 60 years. E.H. Paolillo, "The Institutional Arrangements for the International Sea-Bed and Their Impact on the Evolution of International Organizations", 188 RDC (1984-V), pp.135-338, at p.229.

48. Formulation to the same effect was incorporated in Article 25(6) of the ISNT, Article 25(6) and (7) of the RSNT, and Article 159(6) and (7) of the ICNT.

49. Adede, op. cit., p.58.

50. Evrinades, op. cit., p.232.

51. UN Doc. A/CONF.62/C.1/L.28, p.22.

52. Ogley, op.cit., p.200.

53. Evrinades, op. cit., p.234.

54. Ogley, op. cit., p.203.

55. Juda, op. cit., p.247. According to Engo, Chairman of the Negotiating Group 3, the developing countries considered the Chamber voting as being little different from the collective veto or weighted vote system. See NG3/2, p.6; see also UN Doc. A/CONF.62/C.1/L.28, p.23.

56. Evrinades, op. cit., p.235.

57. The Convention, Article 161(8). These categories will be elaborated later. See infra, notes 101-111 and the accompanying texts.

58. According to Article 156(3), conferring the status of observer should be in accordance with the rules, regulations and procedures of the Authority.

59. The Convention, Article 176.

60. A-C. Kiss, "La notion depatrimoine commun de 1'humanite, 175 RDC (1982-II), pp.99-256, at pp.211.

61. The Convention, Article 157(3) and (4).

62. Ibid., Articles 184 and 185. In the case of suspension of exercise of rights and privileges of membership, the Sea-Bed

Disputes Chamber must already find that a state party has grossly and persistently violated the provisions of Part XI.

63. Ibid., Articles 140 and 150.

64. Paolillo has called these functions "organization, control and conduct of activities". See Paolillo, op. cit., p.195.

65. The rules, regulations and procedures concerning the activities in the Area are divided into four groups: administrative procedures, operational rules, regulations concerning financial matters and finally rules relating to the implementation of decisions concerning compensation for developing countries which suffer adverse effects caused by activities in the Area. See Annex III, Article 17.

66. According to Paolillo, it was due to pressure from some industrialized countries that this sentence was included in Article 153(4) in order to clarify that "the control would be exercised by the Authority solely for the purpose of securing compliance by states and other entities . . . with the Convention". See Paolillo, op. cit., p.205.

67. The Convention, Article 153 (5).

68. Ibid.

69. Ibid.; Annex III, Article 17(1)(b)(viii).

70. Adede, op. cit., p.59.

71. The Convention, Article 151(2)(d); Annex III, Articles 6 and 7.

72. Ibid., Article 143(3)(b)(ii). It should be noted that the position of the developing countries from the beginning was that the marine scientific research in the Area should be carried out solely by the Authority, but this position was subject to successive compromises in different negotiating texts, and the final text in Article 143(3) of the Convention permits the states parties to carry out marine scientific research in the Area.

73. Ibid., Article 144(1).

74. For discussion on the constraints for the Authority to demand the technology from the contractor, see Chapter Five.

75. The Convention, Annex III, Article 16.

76. Ibid., Article 150(b).

77. Ibid., Article 151(1)(a).

78. Ibid., Article 151(1)(b).

79. A. Pardo, "The Convention on the Law of the Sea: A Preliminary Appraisal", 20 SDLR (1983), pp.489-503, at p.500.

80. The Convention, Article 151(d).

81. While the existence of a plenary forum, an executive body and a secretariat for an international organization is traditional, the creation through an international conference of a business entity, more or less identical to a huge mining company, is unprecedented. Therefore, giving a special status to the Enterprise as an organ belonging to the Authority, yet not enjoying the same status, rights and duties as a principal organ, is comprehensible.

82. The Convention, Article 158(3).

83. Ibid., Article 159(2) and (3).

84. Ibid., Article 159(7) and (8).

85. Ibid., Annex IV, Article 11(3)(c). There is one more case which, according to Article 159(8) of the Convention, shall be decided by a two-thirds majority vote, but due to the interpretation of the Preparatory Commission requires consensus. According to Article 160(2)(e), the Assembly is empowered to "assess the contributions of members to the administrative budget of the Authority in accordance with an agreed scale of assessment based upon the scale used for the regular budget of the United Nations". The reference to "agreed scale" in this provision, according to the interpretation of the Preparatory Commission enumerated in rule 35 of its Rules of Procedure, is a scale agreed upon by consensus. Such an interpretation certainly benefits the major contributors which may use this veto right "for obtaining concessions and for influencing the work of the Authority". See Paolillo, op. cit., p.231; see also UN Doc. LOS/PCN/28, Rule 35(1)(a).

86. The Convention, Article 159(9) and (10).

87. Ibid., Article 160(1).

88. Ibid., Article 160(2)(i), (j) and (k) respectively.

89. Ibid., Article 160(2)(a), (m) and (e) respectively.

90. For example, in the case of creating subsidiary organs "due account shall be taken of the principle of equitable geographical distribution and of special interests and the need for members qualified and competent in the relevant technical questions dealt with by such organs"; ibid., Article 160(2)(d). As regards the equitable sharing of financial and other economic benefits derived from activities in the Area, Article 160(2)(g) gives the Assembly the power to decide "consistent with this Convention and the rules, regulations and procedures of the Authority". On the other

hand, the Council, in Article 162(2)(o)(i) is empowered to "recommend" to the Assembly rules, regulations and procedures for such an equitable sharing but surprisingly there is no specific mention of this "recommendation" of the Council in Article 160(2)(g), while when such an inter-relation between the functions of the Assembly and the Council exists, reference is usually made to it. See, e.g., Article 160(2)(c), ()(i) and (1). This lack of reference to the "recommendation" of the Council may be construed as an indication to the power of the Assembly to take decisions for equitable sharing of benefits irrespective of the recommendations of the Council, but in accordance with the Contention and rules, regulations and procedures of the Authority.

91. Kiss, op. cit., at p.214.

92. The Convention, Article 162(1).

93. As discussed before, the negotiations in the Conference proved that a fair balance of representation in the Council among all states parties and group of states was unattainable. Such as Austria and Spain have a very remote chance of getting a seat in the Council. See supra, notes 45, 47 and the accompanying texts.

94. The Convention, Article 161(1)(a), (b), (c) and (d).

95. Ibid., Article 161(2)(c). This provision is to defeat any effort by the majority in the Assembly to exclude any particular country from the election to the Council.

96. These geographical regions are Africa, Asia, Eastern Europe (Socialist), Latin America and Western Europe and others.

97. See Paolillo, op. cit., p.186.

98. Post, op. cit., p.161.

99. The Convention, Article 161(6) and (7).

100. Ibid., Article 161(8)(a).

101. Decisions relating to the exercise of the Council's powers under Article 162(2)(f), (g), (h), (i), (n), (p), (v), and also decisions concerning requesting advisory opinion of the Sea-Bed Disputes Chamber by the Council (Article 191) are included in the first category with the requirement of a two-thirds majority.

102. These decisions are concerned with those functions of the Council which are listed in Articles 162(1); 162(2)(a), (b), (d), (e), (1), (q), (r), (s), (t), (u), (w), (x), (y) and (z); 163(2); 174(3); Annex IV, Article 11.

103. These include, inter alia, issuing emergency orders to prevent serious harm to the marine environment through suspension or adjustment of operations, establishing subsidiary organs, instituting proceedings on behalf of the Authority before the Sea-Bed Disputes Chamber in cases of non-compliance, to borrow on behalf of the Authority, etc.

104. The Convention, Article 161(8)(e).

105. Ibid.

106. These provisions are incorporated in Article 162(8)(m) and (o).

107. The Convention, Article 162(j)(i).

108. Ibid., Article 162(8)(q).

109. Ibid., Article 162(8)(h).

110. Paolillo, assuming the representation of at least nine industrialized countries in the Council, argues that these countries "will in most instances be able to gather from within their group the one-fourth-plus-one majority required to block the adoption of decisions" on questions requiring a three-fourths majority. See, Paolillo, op. cit., p.241. See also, supra, note 99. Remembering the fact that some of the industrialized countries such as Canada or France and smaller countries may not necessarily follow the same policy as the others such as the United Kingdom, the Federal Republic of Germany and the United States, it is not certain that all industrialized countries members in the Council may easily agree to adopt the same policy in regard to the questions of before the Council.

111. U.S. Delegation Report from the Seventh Session of the UNCLOS III as quoted in Juda, op. cit., p.246.

112. Evrinades, op. cit., p.235.

113. Paolillo, op. cit., p.306.

114. The Council's general right to establish subsidiary organ is laid down in Article 162(2)(d) of the Convention, but it is also provided, in subparagraph (2)(y) of the same article for the establishment of:
". . . a subsidiary organ for the elaboration of draft financial rules, regulations and procedures relating to:
(i) financial management in accordance with articles 171 to 175, and
(ii) financial arrangements in accordance with Annex II, Article 13 and Article 17, para. 1(c)".

115. The Convention, Article 163(2).

116. Ibid., Article 163(3) and (6).

117. Ibid., Article 163(4) and (7).

118. Ibid., Article 163(8).

119. Ogley, op. cit., p.211.

120. The Convention, Article 164(1).

121. Ibid., Article 164(2)(d).

122. Ibid., Article 162(2)(j).

123. Ibid., Article 164(2)(d).

124. Ibid., Article 162(2)(j)(ii).

125. Ibid., Article 165(2)(d), (h), (k) and (1).

126. Hauser, op. cit., p.45.

127. B.H. Oxman, "The Third United Nations Conference on the Law of the Sea: the Eighth Session (1979", 74 AJIL (1980), pp.1-47, at p.15.

128. The Convention, Annex IV, Article 12(6), which reads: "Without prejudice to any general or special power conferred on the Enterprise under any other provision of the Convention, the Enterprise shall exercise such powers incidental to its business as shall be necessary".

129. The Convention, Article 160(2)(a), (d), (e), (g), (k), (m) and (n). Article 160(2)(n), e.g., which seeks to accord to the Assembly the competence to refer a particular question not specifically entrusted to any organ of the Authority to an organ which it decides, has balanced this competence with two qualifications, firstly, that particular questions should not be expressly assigned to any organs, and secondly, assignments by the Assembly must be made in conformity with the Convention's general assignment of matters and competence among the organs of the Authority. See Hauser, op. cit., p.41.

130. The Convention, Article 162(2)(b), (c), (h) and (i).

131. Ibid., Article 160(2)(f)(ii).

132. Ibid.

133. Ibid.

134. Paolillo, op. cit., p.253.

135. Article 158(3) of the Convention prescribed that subsidiary organs shall be created later when it deemed necessary. It may be remembered that the original position of the G77 was

that all five organs, and the Enterprise as the political symbol of that group, be "principal organs" but the special character of the Enterprise as a commercial entity capable of competition with other commercial entities, rendered it necessary to place this organ in a category other than any traditional organizations.

136. The Convention, Annex IV, Article 1.

137. Ibid., Annex III, Article 11.

138. Ibid., Annex IV, Article 13(1).

139. Ibid., Annex IV, Article 13(2).

140. Ibid., Article 170(2).

141. Ibid., Annex IV, Article 13(3)(b) and (4)(a).

142. Ibid., Annex IV, Article 13(4)(d).

143. Ibid., Annex IV, Article 13(5).

144. Ibid., Annex IV, Article 2(2); ibid., Article 170(2).

145. Ibid., Annex IV, Article 5(1) and (2).

146. Ibid., Annex IV, Article 5(7) and (8).

147. Ibid., Annex IV, Article 6(c), (e), (f), (g), (m) and (n).

148. Ibid., Annex IV, Article 7(1).

149. Ibid., Annex IV, Article 7(2).

150. Ibid., Annex IV, Article 7(3).

151. Ibid., Annex IV, Articles 5(4) and 7(4).

152. Paolillo, op. cit., p.262.

153. The Convention, Annex III, Article 5(3) and (7).

154. Ibid., Annex, Article 12(3).

155. Ibid., Annex IV, Article 11(2)(a).

156. See Chapter Five.

157. The Convention, Annex IV, Article 12(7).

158. Paolillo, op. cit., p.269.

159. The Convention, Article 158(1).

160. Ibid., Articles 166(3) and 167(1).

161. Ibid., Article 166(2).

162. Ibid., Article 168(1). This formulation is identical to the one used in Articles 5(4) and 7(4) of Annex IV concerning the Governing Board, the Director-General and the Staff of the Enterprise.

163. Ibid., Article 168(2).

164. Ibid., Articles 166(4) and 169(1).

165. The supervisory function of the Secretariat was prescribed in Article 40 of the ISNT, which reads:
"1- The Authority shall, as necessary, establish a staff of inspectors. The staff of inspectors shall have the responsibility of examining all activities in the Area to determine whether the provisions of this Convention, the rules, regulations and procedures prescribed thereunder, and the terms and conditions of any contract with the Authority pursuant to this Convention are being complied with.
2- The inspectors shall report any non-compliance to the Secretary-General. The Secretary-General shall immediately notify the Chairman of the Council and of the Technical Commission."
Off. Rec., Vol. IV, p.145.

166. The Convention, Article 162(2)(a).

167. UNTS, Vol. 450, p.169.

168. See L.C. Caflisch, "The Settlement of Disputes Relating to Activities in the International Sea-bed Area", in Rozakis, op. cit., pp.303-44, at p.303. See also, A.O. Adede, "Settlement of Disputes Arising Under the Law of the Sea Convention", 69 AJIL (1975), pp.798-818, at p.798.

169. Caflisch, op. cit.; Ogley, op. cit., p.215.

170. Resolution 2749 (XXV), para. 15.

171. L.B. Sohn, "A Tribunal for the Sea-Bed or the Oceans", 32 ZaoRV (1972), pp.253-64, at pp.253-54.

172. Ibid., pp.254-56.

173. A.O. Adede, "Prolegomena to the Dispute Settlement Part of the Law of the Sea Convention", 10 NYUJIL (1977), pp.253-393, at p.255.

174. Ibid., p.256.

175. Ibid., p.258.

176. UN Doc. A/CONF.62/WP.9.

177. UN Doc. A/CONF.62/WP.8, Article 24.

178. Ibid., Article 32(1)(a) and (b).

179. Ogley, op. cit., p.212.

180. Article 191 of the ICNT. See Ogley, op. cit., p.218.

181. Articles 56(1)(a) and 58(1) of the Convention.

182. G. Jaenicke, "Dispute Settlement Under the Convention on the Law of the Sea", 43 ZaoRV (1983), pp.813-27, p.816.

183. Conciliation, according to Article 284 of the Convention is not a mandatory procedure. It is, in the system of disputes settlement of the Convention, a stage prior to judicial settlement, and becomes operative only if both parties agree to that. Nevertheless, in the case of certain disputes which are excluded from the compulsory judicial settlement procedure such as the conservation of the living resources of the EEZ, scientific research activities in the EEZ and the delimitation of the maritime boundaries, recourse to conciliation is obligatory. See the Convention, Article 297, and Annex V, Section 2. See Jaenicke, op. cit., pp.825-26.

184. The Convention, Article 287(1).

185. See Adede, "Prolegomena . . .", op. cit., p.258.

186. The Convention, Article 287(3) and (5).

187. On general or special arbitral tribunals, see the Convention, Annexes VII and VIII.

188. The Convention, Annex VI, Article 2.

189. Ibid., Annex VI, Articles 4 and 5.

190. Paolillo, op. cit., p.275.

191. The Convention, Annex VI, Article 15(4).

192. Ibid., Annex VI, Article 14.

193. Sharma, "Framework of Likely Disputes under the Law of the Sea Convention - Some Thoughts", 45 ZaoRV (1985), pp.465-96, at pp.470-71.

194. Ibid., p.471.

195. Paolillo, op. cit., p.275.

196. The Convention, Annex VI, Article 35. This formulation makes it possible that judges from the developing countries shall be predominantly represented. See Ogley, op. cit., p.223.

197. The Convention, Article 188.

198. Ibid., Annex VI, Article 36.

199. W. Riphagen, "Dispute Settlement in the 1982 United Nations Convention on the Law of the Sea", in Rozakis, op. cit., pp.281-301, at p.286.

200. The Convention, Article 191.

201. Ibid., Article 159(10).

202. The Convention, Article 187(a).

203. Caflisch, op. cit., p.310.

204. The Convention, Article 187(b)(i) and (ii). According to Paolillo, what is meant by "misuse of power" is "when an act which unobjectionable in form and substance is carried out by an organ for a purpose other than for which the act is legally prescribed". See Paolillo, op. cit., p.291.

205. Paolillo, op. cit., pp.285-86.

206. The Convention, Article 189.

207. Paolillo, op. cit., p.287.

208. Ibid.

209. Jaenicke, op. cit., p.821.

210. Paolillo, op. cit., pp.287-88.

211. Caflisch, op. cit., p.310.

212. Treaty Establishing the European Economic Community, Article 173, UNTS, Vol. 298, pp.11-165. See also Caflisch, ibid., p.312.

213. Caflisch, op. cit., p.312.

214. Jaenicke, op. cit., at p.82.

215. The Convention, Article 189.

216. Caflisch, op. cit., p.314.

217. Ibid.

218. The Convention, Article 187(d).

219. Ibid., Article 187(c)(i).

220. Ibid., Article 187(e).

221. Ibid., Annex III, Article 13(15) which reads:
"In the event of a dispute between the Authority and a contractor over the interpretation or application of the financial terms of a contract, either party may submit the dispute to binding commercial arbitration, unless both parties agree to settle the dispute by other means, in accordance with article 188, paragraph 2.
The reference to Article 188(2) means that whenever the question of interpretation arises, it has to be submitted to the Sea-Bed Disputes Chamber."
See Caflisch, op. cit., at p.322.

222. Ibid., Annex III, Article 5(4).

223. See Caflisch, op. cit., p.320.

224. When the G77 finally agreed to the possibility of the submission of disputes concerning the interpretation and application of the contracts to binding commercial arbitration, it was insisted that such access to commercial tribunal should not become a norm established in the Convention, but shall be subject to the agreement between the parties and included in the contract. This position was demonstrated in Article 188(2) of the ICNT/Rev. 1, which reads:
"Disputes referred to in article 187, paragraph (c) shall be submitted to binding commercial or other arbitration in so far as provided in any contract between the parties to the dispute at the request of any party thereto. Failing agreement of the parties, the procedure in accordance with commercial arbitration rules to be specified shall apply."

225. The Convention, Article 188(2)(a).

226. Ibid., Article 188(2)(b).

227. Ibid.

228. One exception is a dispute between states parties concerning interpretation and application of Part XI of the Convention and its related annexes. In this case, the dispute may be submitted, at the request of both parties to a special chamber of the International Tribunal for the Law of the Sea [Article 188(1)(a)] of the Convention.

229. The Convention, Article 188(2)(a); Annex III, Article 13(15). The exception to this arrangement is the submission of disputes concerning the fairness and reasonableness of commercial terms and conditions for technology transfer in which case either party has the right to refer the disputes to commercial arbitration. Since it is possible that at least the first generation contracts are from among entities belonging to the industrialized countries, and it was in fact these countries which insisted on the introduction of commercial arbitration into the disputes settlement system,

it can be expected that these countries and their entities will not agree in their contracts with any other agreement. The result shall be that almost always any party to a dispute can unilaterally submit it to the relevant tribunal, be it the Sea-Bed Disputes Chamber or its ad hoc chamber, or an arbitral tribunal.

230. The Convention, Annex VI, Article 37. See also Annex VI, Article 20; Statute of the ICJ, Article 34(1).

231. The Convention, Article 190. In view of the second part of this article, Caflisch asserts that:
"This enigmatic provision is the fruit of a compromise between a number of industrialized States which felt that in contractual matters States and individuals ought to be placed on an equal footing, and the socialist States, the Soviet Union in particular, which were reluctant to allow proceedings to be brought by individuals against sovereign States endowed with immunity from legal process by the general principles of international law."
See Caflisch, op. cit., p.317.

232. This is implied in Article 40(1) of Annex VI of the Convention which provides that other sections of that Annex including Section 3 concerning the procedure of the International Tribunal of the Law of the Sea shall apply to the Sea-Bed Disputes Chamber provided no incompatibility between the provisions of the former and the special provisions of the latter occur.

233. The Convention, Annex III, Article 5(4).

234. Ibid., Article 188(c) and Annex III, Article 13(15).

235. Jaenicke, op. cit., p.822.

236. The Convention, Annex III, Article 21(1). When the arbitral tribunal deems it necessary to request the Sea-Bed Disputes Chamber to give an advisory opinion on the interpretation of a particular provision of the Convention, the rules, regulations and procedures of the Authority shall precede the terms of the contract. See ibid., Annex VI, Article 38.

237. Ibid., Article 293(2).

238. See Caflisch, op. cit., p.328.

239. W.C. Brewer, Jr., "Deep Sea-bed Mining: Can an Acceptable Regime Ever Be Found?" 1 ODIL (1982), pp.25-67, at p.50.

240. Pardo, op. cit., p.499.

241. UN Doc. A/CONF.62/C.1/L.28, p.22.

242. Engo explained the acceptance of this difference by the Conference as "a recognition that the realities of

circumstances and time demanded an acceptance of categories of special interests which arose mainly from considerations of an economic and financial character touching upon the immediate wellbeing of certain states". As a result of this recognition, it was decided to give assurances to both the so-called "majority and minority", perhaps not so much on the basis of principles as on that of the reality and understanding". See Report to the First Committee on the Work of Negotiating Group 3, NG3/2, pp. 3, 5.

243. It is asserted that both developing and developed countries had agreed that "the Enterprise is not expected to be as efficient as other operators . . .". The real purpose of establishing the Enterprise, according to the same assertion, is to gain greater control of international organizations by developing countries, greater control of raw material markets by producers, and greater control of national resource development projects by the states. See B.H. Oxman, "The Third United Nations Conference on the Law of the Sea: The 1976 New York Sessions", 71 AJIL (1977), pp.247-69, at p.253. Looking at the provisions of the Convention concerning the Authority and the Enterprise, it becomes evident that none of these purposes has been achieved. Such controls could be substantiated if the Authority, and particularly its Assembly, had discretionary power to "control entry, assign markets, fix prices, or otherwise intervene in opposition to market forces". See B.H. Oxman, "The Third United Nations Conference on the Law of the Sea: The Ninth Session (1980)", 75 AJIL (1981), pp.211-56, at p.214.

CHAPTER SEVEN

THE PREPARATORY COMMISSION OF THE INTERNATIONAL SEA-BED AUTHORITY

SECTION I: ESTABLISHMENT OF THE COMMISSION

The need for the establishment of a preparatory commission with the intention of preparing in advance for the commencement of the operation of the new institution established by the Convention upon the entry into force of that instrument was felt and discussed in 1980, when the prospect of the conclusion of the work of the Conference was in sight.[1] This was, in fact, in line with the practice of many other international organizations.[2] What was unique was that the preparatory commission, after its primary function, was to be mandated with an extra function, namely, the administration of an interim regime for the protection of preparatory investment in pioneer activities.

The considerable investments of the ocean mining consortia in the years prior to the adoption of the Convention had given rise to the demand by some of the industrialized countries for the integration of the nationally recognized claims of these consortia with the regime envisaged in the Convention.[3] The question of preparatory investment protection was not discussed in the Conference until the very last session in March 1982, when the G77, as an important concession, accepted the adoption of an interim regime for such protection in order to attract the American mining industry and to persuade the United States and other industrialized countries to join the Convention.[4]

Two of the resolutions adopted by the Conference in its final session, as part of a package with the Convention, were annexed in the Final Act of the Conference. Resolution I provided for the

establishment of the Preparatory Commission for the International Sea-Bed Authority and for the International Tribunal for the Law of the Sea.[5] The regime governing preparatory investment in pioneer activities relating to polymetallic nodules is incorporated in Resolution II.[6]

The future of the legal regime for the Sea-bed Area and its international organization as envisaged in the Convention depends, to a great extent, on the outcome of the work of the Preparatory Commission, which is entrusted with the task of preparing for the commencement of the operations of the Authority and the International Tribunal for the Law of the Sea, and administering the interim regime, pending the entry into force of the Convention, for the protection of pioneer investments.

The rules, regulations and procedures which shall be adopted by the Preparatory Commission in fulfilment of its first function, i.e., preparation for the establishment of the Authority's organs and implementation of Part XI, are going to give a more or less final shape to the legal regime for the Sea-bed Area, and as such, shall play a significant role in the taking of a decision by some industrialized countries as to whether they should ratify the Convention or accede to it.

The special importance attached to the Preparatory Commission and its role requires a closer study of the functions and the machinery provided for the implementation of these functions of the Preparatory Commission. We also intend, in this chapter, to evaluate the outcome of the Commission's work so far.

SECTION II: ASPECTS OF THE PREPARATORY COMMISSION

(a) Legal Bases of the Commission

The creation of the Preparatory Commission was provided for in Resolution I adopted by the Conference. Certain functions of the Commission concerning preparatory investment protection have been embodied in Resolution II, which has the same legal status as Resolution I. Both resolutions were included in the Final Act of the Conference which was signed by participants of the Conference. The question is what is the precise legal character of the two resolutions? In fact, the resolutions constitute a decision of the Conference, and the intention of the Conference was to make them binding upon the states that signed both the Final Act and the Convention and then have participated in the work of the Preparatory Commission.

The legal effects of Resolution I would be the same as those of an agreement setting up a preparatory body for an organization and entering into force upon signature. Nevertheless, not only the two resolutions, which have the same legal status, constitute the legal ground for the activities of the Commission, but also the Commission should be guided by the provisions of the Convention itself. References to the Convention are to be found in many provisions of both resolutions, e.g., in paragraph 5(e), paragraphs 10 and 11 of Resolution I and in the preambular paragraph and paragraph 1 of Resolution II. In paragraph 1(f) of Resolution II we read:

"Area", "Authority", "activities in the Area" and resources "have the meanings assigned to those terms in the Convention".

In listing the legal instruments governing the activities of the Commission, one should also mention the Rules of Procedure of the UNCLOS III which, in accordance with paragraph 4 of Resolution I, applied mutatis mutandis to the adoption of rules of procedure of the Commission. Since the Commission at the first session adopted its own rules of procedure, the former ones ceased to be applicable. More importantly, the Commission has an internal law. This law can be used as the legal basis for the activities of the Commission. It also allows the Commission to make its own resolutions having a binding character. Based on this law, the Commission, like many international organizations, has the right to adopt legal rules that regulate its internal matters. For example, in 1983, the Preparatory Commission adopted two resolutions concerning internal problems of the Commission falling under the category of internal law, namely a resolution on the Structure of the Preparatory Commission, Functions of the Organs and Bodies of the Preparatory Commission, Officers and Venue and a resolution on Rules of Procedure on Decision-making.[7]

To some extent also the Charter of the United Nations and regulations adopted by the General Assembly are applicable to the Preparatory Commission. In accordance with paragraph 14 of Resolution I, the Commission is financed "from the regular budget of the United Nations subject to the approval of the General Assembly".[8] The secretariat services of the Commission are provided by the United Nations (paragraph 15 of the same resolution). Thus, the Staff Regulations binding on the United

Nations staff are applicable to the personnel temporarily working for the Commission.

Thus it seems that the enumeration of the different legal sources from which stem the legal norms concerning different aspects of activities of the Preparatory Commission demonstrates the complexity of legal problems with which the Commission may be confronted.

(b) Duration of the Commission

Formally, the Preparatory Commission, established by Resolution I, was adopted by the Conference on the Law of the Sea simultaneously with the Convention on 10 December 1982. The Commission should be convened by the Secretary-General of the United Nations upon signature of or accession to the Convention by 50 states. This occurred on 10 December 1982, when the Convention was signed by 119 states. The Commission should meet no sooner than 60 days and no later than 90 days after that date. It met for the first time on 15 March 1983, that is, a few days after the time limit fixed in Resolution I.

The question of the duration of the Preparatory Commission caused certain minor problems. In a note from the President of the Conference, it was suggested that the life of the Commission should last at least until entry into force of the Convention and until the first meetings of the Assembly and the Council of the Sea-Bed Authority are convened.[9]

In the discussion the view was expressed that, lacking a sufficient number of ratifications (i.e. 60), the Convention might not enter into force for years. The question was raised whether it would not be wise to prescribe a time limit for the activities of the Commission. The Group of 77 proposed that the Commission should not continue indefinitely if the Convention had not entered into force after a certain period. However, other delegations regarded such a provision as not appropriate and their point of view prevailed. The proposal of the G77 was not retained in the Resolution.[10]

The opinion was also expressed in the discussion that, although "the life of the Preparatory Commission should not be unduly long",[11] it might be useful to extend it beyond the convening of the Assembly. The latter view finally prevailed and the following wording was adopted:

> The commission shall remain in existence until the conclusion of the first session of the Assembly, at which time its property and records shall be transferred to the Authority. (Resolution I, paragraph 13).

(c) Sessions of the Commission

The Preparatory Commission, which convened according to operative paragraph 1 of Resolution I, held its first session in Jamaica - first in March-April and later in August-September of 1983. The whole of the first session was devoted to the discussion and adoption of procedural measures. In this session Joseph S. Warioba from Tanzania was elected as the Chairman.

The substantive discussion started in 1984. The Preparatory Commission has so far met twice every year in Kingston (Jamaica), Geneva or New York.

The Commission fixed without difficulty the timing of its sessions, but the question of venue has turned out to be controversial. At the Conference, certain delegations from developed and developing countries preferred as the location of the Preparatory Commission the United Nations headquarters. There were at least two reasons to justify such a position: all of them had permanent missions in New York and in Geneva and, when meetings of the Commission are held at the UN headquarters, the expenditures are lower both for delegations and for the United Nations. However, when the Conference decided to locate the permanent seat of the Sea-bed Authority in Jamaica, Jamaica persuaded the majority of developing states to insist on the location of the Preparatory Commission at the seat of the Authority. This was reflected in paragraph 12 of Resolution I, subject to the availability of appropriate facilities.

The decision taken at the first session, namely, every year to meet for four weeks in Kingston and four weeks in New York or Geneva, constituted a kind of compromise. Nevertheless, this decision has not definitely settled the controversy in respect of venue of sessions of the Preparatory Commission. Jamaica, as host country both for the Authority and for the Preparatory Commission, has insisted that all sessions of the Commission should be held in Kingston.[12]

(d) Purposes and Functions

The Preparatory Commission, whose primary objective is "to ensure the entry into effective operation without undue delay of the Authority and the Tribunal and to make the necessary arrangements for the commencement of their functions",[13] consists, under the second operative paragraph of Resolution I, of representatives of states which have signed the Convention or acceded to it. Those states which have signed the Final Act may participate in the deliberations of the Commission without participating in the taking of decisions. This was a compromise formula between the G77, which insisted on the limitation of the members to only the signatories of the Convention and the industrialized countries, which were of the opinion that the membership should also be extended to the signatories of the Final Act.[14]

The specific functions of the Preparatory Commission are embodied in operative paragraph 5 of Resolution I, which includes, inter alia, preparation of draft rules of procedure of the Assembly and of the Council [paragraph 5(b)], preparation of draft rules, regulations and procedures, as necessary, to enable the Authority to commence its functions [paragraph 5(g)], exercise of powers and functions assigned to it relating to the protection of preparatory investments [paragraph 5(h)], and undertaking studies on the problems which would be encountered by developing land-based producer states likely to be most seriously affected by the production of minerals derived from the Area [paragraph 5(1)].

Being a transitional institution in nature, the Commission started in 1983 and "shall remain in existence until the conclusion

of the first session of the Assembly, at which time its property and records shall be transferred to the Authority".[15]

(e) Organization of the Commission

In order to carry out its functions, the Preparatory Commission, during its first session, decided to establish four special commissions of equal status and the plenary as the principal organ.[16] In fact, the decision was in conformity with the relevant provisions of Resolution I (in particular paragraphs 7, 8 and 9). The creation of two of the special commissions, namely, Special Commission I for the problems of the developing land producer countries and Special Commission 2 for the establishment of the Enterprise, had been envisaged in paragraphs 8 and 9 of Resolution I. Special Commission 3 for the sea-bed mining code and Special Commission 4 for the preparation of the International Tribunal for the Law of the Sea, were created on the basis of paragraph 7 of Resolution I, which confers upon the Preparatory Commission the power to establish such subsidiary bodies for the exercise of its functions.

The plenary, as the principal organ, is responsible for the main tasks of the Preparatory Commission: elaboration of rules of procedure of organs of the Authority, creation of a mechanism for the protection of the pioneer investment according to Resolution II and preparation of the final report of the Preparatory Commission to the Assembly of the Authority. In carrying out its duties, the plenary is assisted by a bureau composed of the Chairman, 14

Vice-Chairmen and the Rapporteur-General. The officers of this bureau, together with the Chairmen of the special commissions and Vice-Chairmen - four each - constitute a General Committee of 36 members whose main function is to act as the executive organ for the administration of Resolution II on pioneer investments.[17]

(f) Decision-making of the Commission

Resolution I is silent about the decision-making mechanism of the Preparatory Commission. The only guideline is given in paragraph 4 of the resolution, which concerns the adoption of the Rules of Procedure of the Commission.[18] The reason for the silence is the controversy between the G77, which adhered to the majority votes or at least the same voting procedure as applied in the Conference itself - majority vote in case of exhaustion of efforts to command consensus - and the industrialized and socialist countries, which demanded consensus.[19] The compromise reached by the members of the Commission at the end of the first session in 1983 was the result of a retreat by the G77. According to rule 35 of the Rules of Procedure, the most important decisions of the Commission are to be taken by consensus. They include those matters which according to the Convention require consensus and are listed in Articles 161, 162 and Article 11(3) of Annex IV.[20]

One case which is included in the category of decisions requiring consensus is the assessment of the contributions of the members to the administrative budget of the Authority,[21] which according to Article 159(8) of the Convention requires a

two-thirds majority.[22] Although this contradiction between the provision of the Convention and the interpretation of the Preparatory Commission seems to have a practical basis, it may be observed that such interpretation is limited to the adoption of relevant proposals only by the Commission.[23] Other questions before the Preparatory Commission which fall into the category of decisions by consensus are the measures for the protection of pioneer investment [rule 35(1)(b) of the Rules of Procedure], sea-bed mining code [rule 35(1)(c)] and the final report of the Commission to the Assembly [rule 35(1)(d)].

Besides the cases mentioned, rule 36(1) requires a two-thirds majority of those present and voting - provided it includes a majority of those participating in that particular session - for decisions on other matters of substance not mentioned in rule 35. It should be observed that, even in cases where the taking of decisions by recourse to majority vote is provided for, efforts should be made to reach a consensus.[24]

It is clear that the decision-making procedure of the Preparatory Commission is more precise than that of the Conference. Consensus is the only procedure for taking decisions on most of the substantive matters and no recourse can be had to voting in those cases enumerated in rule 35 of the Rules of Procedure even if the Commission faces a deadlock.[25]

Such a decision-making procedure, even though workable during the course of the Conference when all participants still looked forward to bringing about an acceptable Convention, and were therefore prepared to make many concessions, is hardly a useful and effective method for working out rules, regulations and procedures

which are supposed to seduce a number of hesitating states to sign or ratify the Convention or accede to it. Given this drawback, the Commission cannot be expected to make rapid progress in its work. Thus, it is relevant to have a closer look at the way the Commission has dealt with the issues before it so far.

SECTION III: ISSUES BEFORE THE COMMISSION

(a) Preparatory Investment Protection

Resolution II governing preparatory investment in pioneer activities has two main objectives: to legalize previous investment of those states and entities which are prepared to continue their activities under the regime set out by the Convention, and thereby "to ensure that the Enterprise will be provided with the funds, technology, and expertise necessary to enable it to keep pace with the states and other entities . . . with respect to activities in the Area".[26]

Resolution II does not define "pioneer investor", but specifies by name eight of them. They include: four state enterprises belonging to France, India, Japan and the Soviet Union and four multinational consortia.[27] In addition to these eight entities, any signatory developing country or its public or private enterprise which has expended 30 million US dollars in pioneer activities before 1 January 1985 shall be referred to as a "pioneer investor".

"Pioneer activities" are defined in paragraph 1(b) of that resolution as the activities related to the exploration aspect, but acquiring the status of pioneer investor for the exploration aspect phase would give these entities priority over their competitors - except the Enterprise - in the allocation of production authorization once the Convention entered into force.[28]

Both the title and paragraph 2(d) of Resolution II suggest that the interim regime of investment protection is only valid for polymetallic nodules, and does not include other sources. The Preparatory Commission is, as one of its main tasks, responsible for the application of the regime in respect of these pioneer investors for the conduct of exploration activities in relation to polymetallic nodules. To fulfil this task, Resolution II has entrusted several duties to the Commission.

In order to register an applicant as a pioneer investor, the Commission requires that the certifying state, i.e. the state which has signed the Convention and of which the applicant is a national, shall issue a certificate governing the level of expenditure made in pioneer activities, and ensure, before making the application, that the area in respect of which application is made does not overlap with an area for which another application is made or is already allocated as a pioneer area.[29]

At the time of adoption of Resolution II in 1982, it was generally expected that potential sea-bed mining entities should apply for registration as pioneer investors immediately after the signing of the Convention by their related states in the same year. Therefore, paragraph 5(c) of Resolution II provides for submission

of conflicts concerning overlapping areas to binding arbitration by 1 May 1983 provided they cannot be resolved by negotiations.

The Commission, within 45 days of receiving the application for registration containing the necessary data with respect to the area and its capability of being divided into two parts of estimated equal commercial value, allocate one part as reserved for activity by the Enterprise or in association with developing countries and the other as a pioneer area for the applicant.[30]

The Commission may request every registered pioneer investor to carry out exploration in the area reserved for the activities by the Enterprise or in association with the developing countries, but the obligation of the pioneer investor in this respect is limited to the reserved area which has been covered by his own application.[31]

The Commission has also a general supervisory function with respect to the administration of the interim regime for the protection of pioneer investments. As a manifestation of this function, it shall provide each pioneer investor with a certificate of compliance with the provision of Resolution II,[32] which includes, inter alia, compliance with the duty to pay a fixed annual fee or to make periodic expenditure,[33] to train personnel for the Enterprise,[34] and to perform obligations prescribed in the Convention relating to the transfer of technology.[35]

The implementation of Resolution II as one of the two main tasks of the Preparatory Commission had already been given priority in the first session of the Commission when the question of procedure and organization was being discussed. What was felt to be most urgent in this respect was an early adoption of procedures and guidelines for the registration of pioneer investors. The

reason for such urgency was the pressure exerted by the Soviet Union and India to have their pioneer applications registered. These two states had notified, in April 1983, the Chairman of the Preparatory Commission of their consultations, in accordance with paragraph 5(a) of Resolution II, to ensure that an overlap did not exist between their areas of application.[36] They had also invoked the same paragraph and declared that they would take further steps if no response from other potential certifying states in regard to the exchange of the coordinates was received before 1 May 1983.

Almost all other potential mining states objected to these declarations and argued that conflict resolution about the areas of application could firstly take place only after the Commission had begun to function by adopting the necessary procedures for the implementation of Resolution II. Secondly, states, by virtue of Article 305 of the Convention, could sign the Convention until 9 December 1984. Therefore, those who had not yet signed the Convention, it was argued, but who would do so by that date, would avail themselves of all rights as pioneer investors.[37]

Against these objections, the Soviet Union and India went ahead with their negotiations, and in May 1983 informed the Chairman of the Commission that they had reached an understanding in the absence of any conflicts between them concerning the areas of application.[38] The persistent efforts of the Soviet Union and India culminated in the submission of their application for registration by the Preparatory Commission as pioneer investors. The Soviet application was filed on 24 October 1983 and the Indian application on 14 February 1984.[39] It is rightly pointed out that:

> The Soviet drive to obtain priority over the other pioneers . . . [was] calculated to put pressure on the non-signatory mining states to sign the Convention for fear that the Soviets would otherwise get first rights to any areas where overlapping claims might exist. 40

Taking this position was probably due to the fact that the Soviet Union had withdrawn from the informal consultations initiated by Canada almost immediately after the adoption of the Convention in order to resolve possible conflicts between all potential deep sea mining states. The reason for the Soviet withdrawal was the participation of several non-signatories in these consultations.[41] Being left outside the club, the Soviet Union had no alternative except to force the pace and press for an early registration of its claim by the Preparatory Commission.

Being faced with the pressure of the Soviet Union and India, the Preparatory Commission, in its second session in 1984, commenced its first reading of the draft rules for registration, and provisionally adopted twenty of them relating to the submission and receipt of applications.[42] The adoption of these rules was overshadowed, however, by related unsettled issues of more significance, namely, the question of the overlapping areas, the preservation of the confidentiality of data submitted by the applicant to the Commission, and the establishment of a group of technical experts to assist the Commission in evaluating the application.[43]

By then, the logic of the industrialized countries concerning the final date of application for registration - 9 December 1984 - was more or less accepted by the majority of the members of the Commission. The main point of concern, therefore, was to find

acceptable solutions to the three related significant issues enumerated above.

Although the resolution of the conflicts related to the overlapping sites lay outside the mandate of the Preparatory Commission, it was decided in this session that the Chairman of the Commission would be given a mandate to assist the pioneer investors to settle their conflicts in this respect.[44]

A few days before the resumption of the work of the Commission, on 3 August 1984, a Provisional Understanding of Deep Seabed Matters[45] was signed by the United States, the UK, the Federal Republic of Germany, France, Italy, Belgium, the Netherlands and Japan. One of the assorted purposes of this provisional understanding was to assure at governmental level the agreement previously reached among the consortia concerning the settlement of conflicts on their claimed areas.[46]

On the first day of the resumed session of the Preparatory Commission on 13 August, both the G77 and the Group of Eastern European (socialist) states sharply criticized this agreement, and rejected the claims of the parties to the provisional understanding that the agreement fulfilled in part the requirement of Resolution II to resolve overlapping claims.[47] According to the G77, the Provisional Understanding went "beyond the resolution of conflicts arising from overlapping claims, by including provisions regarding exploration and exploitation of the sea-bed resources, outside the Law of the Sea Convention".[48]

Almost one week later, Japan and France filed their applications with the Commission for registration as pioneer investors.[49] The willingness shown in the previous meeting in

April 1984 by the Soviet Union to hold consultations with other deep sea mining members of the Commission, namely, India, Japan and France, together with the application of these countries for registration as pioneer investors and the intensive efforts of the Chairman of the Commission, led to an agreement concerning the timetable and procedure for resolution of conflicts with respect to overlapping claims among all applicants submitting their applications before 9 December 1984.[50] According to this agreement - Understanding on the Procedure for Conflict Resolution among the First Group of Applicants - all applicants would meet on 17 December 1984 to exchange coordinates of their respective claimed areas. In case of conflict, negotiations should start not later than 11 January 1985, and be completed by 4 March. The report concerning conflict resolutions would be submitted to the Chairman of the Commission by 8 March, which was three days before the scheduled opening of the third session. The agreement of the applicants to act according to this schedule was the most significant achievement of the second session of the Commission. In light of the optimism created as a result of this agreement, the hope was expressed that consideration of the draft rules[51] for registration of pioneer investors would be completed and the rules adopted by the next session in March 1985. As a result of this achievement, the Chairman of the Commission presented some suggestions with respect to rules regarding the creation of a group of technical experts.[52]

Further to the signing of the Provisional Understanding by some industrialized countries of the West and Japan, which ensured the settlement of all conflicts with respect to the claimed areas, the United States issued, on 29 August 1984, exploration licences for

three of the four consortia.[53] These licences were all for sites in the Clarion-Clipperton Zone in the Pacific Ocean. They were not in conflict with the areas claimed by France, Japan or India, but they were possibly overlapped by the areas applied for by the Soviet Union. The G77 reacted to the issuing of these licences by calling them "wholly illegal".[54] Nevertheless, the application of all four states mentioned in paragraph 1(a)(i) of Resolution II for registration as pioneer investors and their agreement to resolve their conflicts concerning overlaps before the Third Session of the Commission in March 1985 was so significant to the effective continuation of the work of the Preparatory Commission that it overshadowed the issuing of the licences by the United States.

Another question related to pioneer investment addressed by the Commission in the summer session of 1984 was the desire of the Federal Republic of Germany to be awarded a pioneer site of its own, similar to the case of Japan which was eligible to participate in both groups of pioneer investors enumerated in paragraph 1(a) of Resolution II. Realizing that the possibility of application of all four consortia for registration as pioneer investors was remote, and being aware of the significance of the Federal Republic of Germany joining the Convention, the G77 did not strongly oppose this demand, and Warioba, the Chairman of the Preparatory Commission, in the last day of the work of the Commission, announced that, if the Federal Republic of Germany signed the Convention, the Commission, recognizing the importance of finding a solution to the problem, would consider it at its next session.[55]

Negotiations between France, Japan and the Soviet Union continued as scheduled. As a result, the overlaps between the

Soviet Union and Japan were provisionally resolved before the convocation of the third session of the Preparatory Commission in March 1985, but the solution could not be final until the overlaps between the Soviet Union and France, which were believed to be 65 per cent, could be settled.[56] The main problem was that the huge overlaps had made it very difficult for the Soviet Union and France to suggest four full sites, two of which were to be reserved for the Authority. Moreover, four members of the Commission, namely, Belgium, Canada, Italy and the Netherlands, made it clear that they might object to registration of a Soviet site that conflicted with the sites claimed by the consortia of which their national companies formed a part, and also maintained that "an acceptable overlaps resolution process must include all potential pioneers identified in Resolution II".[57] Due to this deadlock with regard to overlapping claims, no real progress was achieved at the spring session of 1985 in the related work of adopting rules for securing the confidentiality of data and for establishing a group of experts to review the pioneer applications. Efforts in the resumed third session in the summer of 1985 did not lead to any solution for the problem, and the delay in implementing Resolution II generated some frustration among the delegates.[58]

As a new cause of complication, the Soviet Union informed the Commission that its deep sea mining enterprise had received a letter from one of the four consortia, Ocean Mining Associates, in which the said consortium, with reference to the licence granted by the U.S. Department of Commerce, had claimed exclusive rights to manganese nodules in the sea-bed area identified in the licence.[59] This could mean that the overlaps existed not only between the

French and the Soviet sites, but probably also between the latter and some of the American licensed sites. The viability of any arrangements decided by the Commission depended on finding a solution which would resolve all conflicts, and not leaving "either the Enterprise or the Soviets holding the bag with a mine site that conflicts with the areas licensed under US national law".[60]

In a declaration submitted by Pakistan on behalf of the G77, and adopted by the Preparatory Commission on 30 August 1985,[61] deep concern was expressed for any action of states which would undermine the Law of the Sea Convention. The G77 also emphasized that any actions incompatible with the Convention - and that included the issuing of licences by the United States - were wholly illegal, and should not be recognized. The adoption of the declaration, although without resorting to a vote, necessitated an explanatory statement by the Chairman, which was attached to the Declaration, referring to the fact that several delegations did not agree with its content.

In an effort to defeat the prevailing frustration, the Chairman indicated, at the conclusion of the session, that if by the beginning of the second week of the spring session of 1986 no understanding had been reached by the applicants on the resolution of overlaps, the matter should be placed before the Commission to determine a course of action. This could mean, in the worst case, a vote in the Commission independent of the views of Japan, France and the Soviet Union. Bearing in mind that the resolution of overlapping claims was not in fact the duty of the Commission but that of the applicants, the indication of the Chairman of the possibility of referring the question to the Commission was evidence

of the fact that the Commission could not afford more frustration in an area which had direct impact on the pace of the processing of work in other related areas.

In line with other efforts to bring about a solution to the problem of overlaps, the Chairman of the Preparatory Commission initiated, in February 1986, some talks with the first group of investors, i.e., France, India, Japan and the Soviet Union, in Arusha, Tanzania. These talks resulted in an agreement known as the "Arusha Understanding" which contained a scheme for the resolution of the overlapping claims through equal sharing of overlapping areas.[62] The purpose of the Arusha Understanding was to provide an acceptable solution to the first investors as well as to the Commission on behalf of the Authority without prejudicing the interests of the multinational consortia. To do so, the overlapping areas were to be equally shared among all applicants and, in case of conflict with the consortia, even among the applicants and the related consortium.[63] Since the Soviet Union was the only applicant which could possibly have overlaps with the consortia, the Arusha Understanding, in an effort to refrain from prejudice to eventual applications by consortia, practically provided for the relinquishment of the major part of the Soviet overlaps with the consortia to the Preparatory Commission.

It is noteworthy that the idea of receiving from the Soviet Union, as a reserved area for the Enterprise, portions of the sites which were contained in the licences issued by the United States and the Federal Republic of Germany, was not acceptable to the Preparatory Commission in the previous year. The main scheme for the implementation of the Arusha Understanding was to designate

equal shares of the sea-bed area in one of the richest areas of the Clarion-Clipperton Zone to each of the first tier applicants, i.e., France, Japan, the Soviet Union and the Enterprise. But a significant departure from Resolution II and the Convention was that, in supplying two mine sites of equal value to the Preparatory Commission, the three applicants, instead of the Commission,[64] became authorized to make the first choice for their own. This, in the case of the Soviet Union, could mean taking a prime area of 52,300 square kilometres for its own and leaving another portion of the troubled area for the Enterprise. Such a compromise gesture and sacrifice on the part of the Authority seems to have been made in the interests of reaching an agreed solution to the problem of overlaps.[65]

When the fourth session of the Preparatory Commission convened in March 1986, the Arusha Understanding received a positive response from almost all groups of participants. The main reason was that further postponement of registration of the first group of pioneer investors was not to the benefit of any group. During this session, extensive discussions were held on the interpretation and implementation of the Arusha Understanding. It was felt, however, that more time was required to study the Understanding. Another significant development in respect of the registration of pioneer investors was the adoption of a declaration condemning the issuing of mining licences by the United Kingdom and the Federal Republic of Germany.[66] The United Kingdom had issued one licence in December 1984 and the Federal Republic two licences at the end of 1985. Even the adoption of this declaration was faced with difficulties, and some of the industrialized countries seriously opposed it.

Hence, the Commission was forced, for the first time, to resort to voting for adopting a declaration, and the declaration was adopted with the majority votes of the developing countries for it, with negative votes of some of the industrialized countries with interests in deep sea-bed mining, and the abstention of small industrialized countries.

Further to negotiations in the resumed fourth session, in the summer of 1986, a modified version of the Arusha Understanding was proposed as an annex to the statement made by the Acting Chairman of the Preparatory Commission.[67] According to this new version, before the fifth session in April 1987, revised applications should be submitted by France, Japan, India and the Soviet Union based on intersessional discussions and necessary data and information which should be made available by the parties to each other.

In order to minimize the worries of many delegates who expressed their concern that the departure from Resolution II might later become a basis for the departure from the Convention, it was emphasized, in the statement of the Acting Chairman, that "these procedures and mechanisms shall not be construed as setting a precedent for the implementation of the regime for sea-bed mining under the Convention, nor do they purport to alter or amend that regime in any way".[68]

Feeling close to a solution, the Commission decided to take steps to establish a group of experts in order to be able to review the revised applications which were to be submitted before the commencement of the work of the Commission in April 1987. In fact, the revised applications were registered in 1987.

Between the summer of 1984 and the end of 1988, seven exploration licences were issued to the multinational consortia in accordance with the national laws by the United States, the United Kingdom and the Federal Republic of Germany. The efforts of the Preparatory Commission during the same period of time led to an agreement which paved the way for the registration of the first four applications inside the framework of the Convention.

The fulfilment of one of the main functions of the Preparatory Commission, i.e., the implementation of Resolution II, proved to be more difficult than anticipated and this was due to the problem of overlapping areas. The solution suggested to this problem entails a concession by the Preparatory Commission in favour of the pioneer investors with respect to the obligation of providing two mine sites of equal value. This concession is consistent with the practice of the G77, in almost all other major questions related to the law of the sea-bed mining. However, the outcome of the work of the Commission in this respect can be assessed as realistic and acceptable. The only concern is that any concession by the Commission, and any departure from the mandate laid down in Resolution II, may leave the impression that the Commission is prepared to make many more concession on other questions under its mandate in order to encourage as many industrialized countries as possible to ratify the Convention.

(b) Creation of the Authority and the Tribunal

Another main task of the Preparatory Commission is preparing for the commencement of the operation of the Authority and the Law of the Sea Tribunal upon the entry into force of the Convention. The task of preparing for the establishment of the Tribunal is entrusted to Special Commission 4, while the plenary and other Special Commissions are charged with the duty of preparing for the establishment of the Authority and its organs, developing detailed rules and procedures for the functioning of the Authority and for sea-bed mining, and preparing draft regulations for the protection of developing land-based producer countries against the adverse effects of sea-bed mining.

The work of the Preparatory Commission in these areas was very much influenced by the stagnation caused because of stalemate in the negotiations on the registration of pioneer investors.

Another significant factor is the delay which has become apparent in commercial prospects for deep sea-bed mining which has reduced the urgency for a speedy fulfilment of the Preparatory Commission's task. In other words, many delegations which, up to the last session of the Conference, feared the imminent commencement of commercial exploitation of manganese nodules, began to recognize at the Preparatory Commission that, due to many developments and changes, it would take some time before such exploitation could happen. Some of these developments were, for example, stagnation in the world market for the minerals to be derived from the sea-bed and the discovery of polymetallic sulphides and manganese crusts in areas of the sea-bed which were presumably under

national jurisdiction. The sulphides were at a much lower depth than the areas of manganese nodules found in the deep sea-bed and therefore were easier and cheaper to exploit.

In the following subsections, we shall try to deal briefly with the outcome of the work of the Commission with respect to its function as the preparatory organ for the establishment of the Authority and the Tribunal.

1. Rules of procedure of the organs of the Authority

One of the functions of the plenary was to adopt the administrative, procedural and budgetary rules of the Authority. Being mostly engaged with the problem of the registration of pioneer investors, the plenary initially devoted very little time to this issue.

The task started by a reading of the draft rules of procedure for the Assembly in the 1984 session.[69] The main concern was that the Authority, at least during its initial stage of operation, should be cost effective and lean.[70] The reading of the draft rules continued during the summer meeting of the Commission in 1984, and by then, 82 out of a total of 111 draft rules had been examined. After the completion of the first reading, a second reading was started in the spring session of 1985. A set of draft rules of procedure for the Council was also distributed at the end of this session.[71] A problem closely attached to the adoption of the rules of procedure was the financial implication of such rules for the states parties. The need for an up-to-date report of the financial

implications of the Convention for the states parties, which was expressed in 1984, was repeated in spring 1985.

A major issue in this session with respect to the Assembly rules was the status of the observers. The question was whether the liberation movements and some international organizations such as the EEC should be given a higher observer status than, for example, non-governmental organizations, and whether non-signatory states should be given the right to participate in the work of the Assembly as observers.[72] The issue of observers, as well as the establishment of subsidiary organs for the Assembly, was deferred to the next meeting for further deliberations.

In the summer of 1985, the plenary succeeded in completing the second reading of the Assembly's rules, and took up the examination of the rules of procedure of the Council. The issues concerning the status of observers and the establishment of subsidiary organs such as a finance committee responsible for the Authority's budget were postponed until the 1986 session. Another hard-core issue was related to various aspects of decision-making.[73] Even consideration of this issue was deferred to the next session.

The plenary completed its first reading of the Council's rules in the spring of 1986 meeting. In this session, the draft rules for election of the members of two subsidiary organs of the Council, the Economic Planning Commission and the Legal and Technical Commission, were considered.[74] It was proposed by six industrialized countries with potential engagement in sea-bed mining that eight out of fifteen members of these subsidiary organs be elected from candidates nominated by the eight states parties most substantially engaged in sea-bed mining.[75] An amendment introduced

by socialist countries provided for the substitution of "equitable" by "equal" geographical distribution as a criterion for the election of the members of the Legal and Technical Commission. The plenary, in resumed fourth session in the summer of 1986, completed its first reading of the rules of procedure for the Legal and Technical Commission, and commenced a first reading of the rules for the Economic Planning Commission.

Due to the significant role that the Legal and Technical Commission can play in the question of the approval of plans of work, much attention was focused on the rules relevant to the functioning of this Commission. Both Eastern and Western European states proposed amendments in regard to aspects of decision-making.[76] No decision was taken on the amendments, and the final solution was postponed until a later session when this question could be settled in a package settlement together with other controversial issues.

By the end of 1988, the plenary had succeeded in completing its reading of many draft rules of procedure for the Assembly, the Council and the Legal and Technical Commission, but most of the significant issues faced by the plenary in the course of deliberations on the draft rules, such as issues relating to the status of observers, decision-making aspects, establishment of subsidiary organs, particularly a finance committee, and the procedure for election of members of the organs of the Council, have been deferred. This is partly due to the delicacy of the issues concerned and the expectation of many participating delegates that the Preparatory Commission interpret the Convention in such a way that the maximum adherence to this instrument can be achieved, and

partly to the delay in the implementation of the other main function of the Commission, i.e., registration of pioneer investors. Thus, as regards the outcome of the work of the Commission with respect to rules of procedure of the organs of the Authority, it is too early to determine the concrete results, and the real challenge for the Commission is yet to come.

2. Developing land-based producer states

The concern of the G77 for the impact of deep sea mining on the economies of the developing land-based producer states led to the insertion of a particular provision in Resolution I. According to paragraph 5(i) of the Resolution, the Preparatory Commission is charged with the duty to undertake studies on the problems which would be encountered by the developing land-based producer states likely to be most seriously affected by the production of minerals derived from the Area, with a view to minimizing their difficulties and helping them to make the necessary economic adjustments, including studies on the establishment of a compensation fund, and submitting recommendations to the Authority thereon.

Special Commission I, entrusted with this duty, commenced its work in the spring of 1984 by considering a working paper on "The general considerations".[77] It was soon recognized that such a study is a technical task requiring a closer analysis of some related issues such as the relation between production from the sea-bed and existing land-based production, the quantity of the possible production from the Area and the effect of such production on developing land-based producer states.[78]

In order to carry out such an analysis, Special Commission I requested the Secretariat of the United Nations to provide it with necessary information on the markets for the minerals, the developing land-based producer states and industries.[79] The data provided by the Secretariat[80] to the summer session of 1984 showed that the prospects for the four main metals contained in the manganese nodules were not so promising. In this session, the question of the identification of the developing countries adversely affected by production from the Area and remedial measures to assist these countries were touched upon.

As regards the identification of the affected developing states, a set of criteria such as, for example, values of the exports of copper, nickel, cobalt and manganese, or a percentage of the export of these minerals in comparison to the total value of export, were contemplated. With respect to the remedial measures, instead of focusing on compensatory measures, more emphasis was given to assistance for structural adjustments, assistance for the maintenance of viable production and export capacity, promotion of trade and conclusion of commodity agreements.[81]

In the 1985 session, deliberations on two main issues, namely the identification of affected states and remedial measures, continued on the basis of working papers prepared by the Secretariat.[82] General agreement was reached that the criteria for the identification of the affected developing states would be based on the degree of dependence of such states on the share of one or more of the four minerals, on their export earnings or on their economies.[83] Special Commission I, therefore, came to the

conclusion that, since there were possibilities for many alterations in the data concerning such a share, this identification of the affected developing states and the assessment of the impact of sea-bed mining on the economy of these countries should not be correctly accomplished before a time rather close to the actual start of the commercial recovery from the Area.[84]

In the 1985 session, several documents containing information or proposals in respect of remedial measures either already applied by other international organizations or suggested by the participating delegations, were submitted to Special Commission I.[85] The Secretariat was requested to undertake two detailed studies on the identification of the factors affecting the degree of dependence of developing land-based producer states on the minerals in question, and the role of those minerals in the economies of those countries. At the end of the 1985 session, the Chairman of Special Commission I felt that sufficient data were at the disposal of the Commission for the carrying out of its work.[86]

In the spring session of 1986, Special Commission I reviewed the methods used by the international organizations to assist the developing land-based producer countries in order to cope with the decrease in the their exports. Moreover, in response to the idea of establishing a compensation fund as a remedial measure, the Group of Eastern European States expressed their objection, contending that such an arrangement would be beneficial only to non-parties to the Convention. The Group proposed instead the conclusion of bilateral compensation agreements between land-based producers and sea-mining states. According to this proposal, the Authority would establish general principles for such agreements.[87]

The idea of a compensation fund was rejected even by some of the industrialized countries. Australia, for example, argued that there was no need for such a fund, because market forces would finally determine which procedures remained viable.[88]

The deliberations on the papers submitted to Special Commission I in the previous meeting and the proposal of the Group of Eastern European States continued in the summer session of 1986. In light of the general recognition of the considerable delays in deep sea mining, the view was expressed that the adoption of any specific remedial measure, be it compensation fund or any other measure, would hardly be of any value to the Authority before the actual exploitation started.[89] The fifth session of the Preparatory Commission was convened in 1987. In this session, discussion continued on the remedial measures.

The result of the work of Special Commission I by the end of 1988 demonstrates that the inclusion of paragraph 5(i) in Resolution I, concerning the study of the effects of deep sea mining on the economies of the developing land-based producer states, has been more or less uncalculated, because the information on the basis of which such a study can be done is subject to rapid change, and no long-term projection is likely to yield a realistic picture of the problem. The solutions which can be worked out under the present circumstances will probably not hold good at the time when actual commercial recovery starts. The realization of this fact has certainly had some impact on the progress of the work in Special Commission I. The Commission has as yet formulated no answers to some decisive questions. For instance, it has not yet determined what the criterion is to be for establishing the relation between

the decrease in the mineral exports or production earnings of land-based producers and mining in the Area.

It is difficult to foresee what the recommendations of Special Commission I to the Authority will be, but it is reasonable to expect that they will have a broad general character, leaving the adoption of concrete measures for the Authority itself and in a situation of a less hypothetical nature.

3. The Enterprise

It is the mandate of Special Commission 2 to provide for the "early entry into effective operation of the Enterprise" and "to ensure that the Enterprise is able to carry out activities in the Area in such a manner as to keep pace with states and other entities" through the application of measures enumerated in paragraph 12 of Resolution II.[90] These measures include, inter alia, training of personnel and the carrying out of exploration in the reserved areas by the pioneer investors.

The work of Special Commission 2 started by considering both the question of organization and operation of the Enterprise and the implementation of paragraph 12 of Resolution II. The general understanding was that, due to the state of the world's mineral markets and the prevailing uncertainty in respect of possibilities for funding the Enterprise operation, which depended to a great extent on the classification of the first 60 states which would ratify the Convention and bring it into force, only a nucleus establishment for the initial stages of the Enterprise should be

contemplated.[91] The submission of some proposals in favour of joint ventures as a viable model for the activities of the Enterprise in the initial stages was also an indication of the fact that the delegations had realized a considerable change in the circumstances had taken place.[92]

According to the working paper submitted by Austria for an interim Joint Enterprise for Exploration, Research and Development in Ocean Mining (JEFERAD),[93] in the period before the entry into force of the Convention, the existence of an interim infrastructure in the form of a joint enterprise was necessary. This was a cheap solution to the requirement of technology transfer, and the establishment could be handed over to the Enterprise as soon as the Convention entered into force.

The Asian-African Legal Consultative Committee also submitted a paper in which difficulties concerning the acquisition of funds, technology and expertise were described, and it was concluded that a form of cooperative arrangement between the Enterprise and the pioneer investors had to be devised.[94] There was more support for the joint venture model, mostly due to the potential shortfall in funding for the Enterprise's independent operation.[95]

In the summer of 1984, some voices were raised against so much concentration on joint ventures, and demands were made for a full examination of all potential operational options open to the Enterprise. Nevertheless, the discussion on this subject continued, and more documents about joint ventures were submitted to the Special Commission.[96] Austria produced a revised version of the working paper on JEFERAD.[97] This gave rise to discussions

about the rights of the Preparatory Commission to make commitments for the Enterprise before the entry into force of the Convention.

In this session the question of pioneer investor obligations to train personnel and explore a reserved site for the Enterprise was taken up. As a result of an exchange of views, certain questions in this respect were given priority. They were, inter alia, the identification of the needs of the Enterprise in respect of qualified administrative and technical personnel, the type of training which is required for exploration and the method of supplying this training by the pioneer investors, and the precise definition of the obligations of the certifying states in relation to the financing of the Enterprise.[98]

Special Commission 2, in its spring session of 1985, in addition to a discussion on the JEFERAD proposal, considered a paper containing a model joint-venture agreement for sea-bed mining prepared by the Federal Republic of Germany.[99] Three other papers on a project profile of a sea-bed mining operation by the Enterprise and an ad hoc expert core group for the Enterprise and training needs and requirements of the Enterprise, were also discussed.[100] At this meeting, consideration of the question of training received a high priority, and an extensive discussion on the joint-venture possibilities and the role of a group of experts to assist the Commission in planning for the Enterprise was deferred until the summer meeting.

The greater part of the resumed third session in the summer of 1985 was devoted to the question of operational options for the Enterprise. Despite widespread support for the joint-venture option, Special Commission 2 decided to study the first option,

"a fully-integrated project carried out independently by the Enterprise".[101] The discussion on training was limited, and further consideration of the problem was postponed to the next session. Due to the close relation of the question of training and the registration of pioneer investors, the delay in the latter had generated some worries concerning the delay in the former.

In this session, two informal meetings were organized in which a revised version of the JEFERAD proposal and an Australian working paper on the economic assumptions governing Enterprise operations were discussed. These assumptions could be used as a basis for closer study of the operational options of the Enterprise.

In the spring session of 1986, once again priority was given to the question of training, leaving the impression that Special Commission 2 observed an alternate turn in considering the two significant issues before it: training and operational options. It was felt, at this session, that the Commission had acquired sufficient material to commence its work on formulating guidelines for a training programme.[102] In this respect, the Commission also took notice of the fact that the significance of the question of training required a reconsideration of the priorities of Special Commission 2 in case the registration of pioneer investors took place before the scheme for training programmes was drawn up.[103] Malta and 15 other countries submitted a draft resolution on a sea-bed mining training course for the nationals of developing countries to be carried out in the International Ocean Institute of Malta.[104] Discussion on this paper, as well as a Soviet study on the required manpower and skills for the Enterprise, was postponed until the next meeting.

Another topic dealt with was the economic viability of deep sea mining, the subject of an Australian study.[105] On the basis of metal-price forecasts and operating costs, the study had concluded that the aggregate metal prices of the four minerals in manganese nodules would have to double before return on investment became attractive enough for private operators. This pessimistic picture gave rise to the question of whether there should be any link between profitability and the timing of the performance of training obligations.[106]

The meeting of Special Commission 2 in the summer of 1986 was characterized by uncertainty about the economic viability of sea-bed mining. The uncertainty which had prevailed in the previous sessions, and had precluded an agreement on the economic assumptions concerning the requirements for the first operation of the Enterprise, led to the taking of the decision that several assumptions and their impact on different operational options should be studied so that the Authority itself could choose, at the time of the start of activities by the Enterprise, which of the options was most profitable.[107]

The major part of the work of Special Commission 2 until the end of 1988 dealt with the questions of the operational options of the Enterprise and the training of its personnel. The uncertainty about the economic viability of sea-bed mining resulted in the agreement that no concrete recommendation concerning any specific option and its preference to other options could be given to the Authority. Neither could the training of personnel be expected to happen with the same speed and to the same extent that had been hoped.

With respect to the above-mentioned uncertainty, it may be expected that with the exception of those aspects which will remain unaffected by the timing of the Enterprise operations, such as its internal structure, the recommendations of Special Commission 2 about other aspects, particularly the operations, will be more in the nature of a broad description of the options rather than concrete specific suggestions.

4. The sea-bed mining code

Special Commission 3 is entrusted with the task of drafting rules, regulations and procedures for prospecting, exploration and exploitation of the mineral resources of the deep sea-bed based on the basic conditions laid down in the Convention. The result of the work of this Commission will be the Sea-Bed Mining Code with detailed rules and regulations for daily reference by the Authority.

Special Commission 3 agreed, in its first meeting in the spring of 1984, that due to the significance which is attached to the detailed rules concerning the exploration and exploitation and the impact of the formation of such rules on the decision of some states to join the Convention, priority should be given to the drafting of rules for exploration and exploitation, and other headlines under its mandate, i.e., the scope and use of terms as rules for prospecting, be dealt with at a later stage.[108] As a result of this agreement, focus was concentrated on the question of applications of entities to the Authority for the purpose of exploration and exploitation. The discussions were based on a

working paper in this respect prepared by the Secretariat.[109] The main concern, however, was to ensure that the adoption of rules would produce a balance between the interest of the Authority, which was the exercise of effective control over sea-bed mining, and that of the operator to complete its operation under favourable conditions.[110]

Discussions on the form and content of the application continued in the summer session of 1984. Although the right to application for the Enterprise, states parties, or natural or juridical persons of the nationality of states parties was not disputed, disagreement existed on the method of submission of an application which could be either directly by the applicant or through the sponsoring states. The question of verifying effective control, the method of locating the mine site and technical qualifications of the applicants were also touched upon in this session.

The work of Special Commission 3, in the spring session of 1985, was concerned with the review of the draft rules relating to the prospecting phase. Although the Convention itself has envisaged a rather limited role for the Authority in that phase,[111] some countries wanted greater control by the Authority in the form of the application fee, application for permission to operate and notification of areas of prospecting.[112] As a balance between this attitude and the approach of those countries which wanted the freedom of prospecting subject to the obligations provided for in the Convention, a third alternative emerged according to which the freedom of prospecting was balanced by the duty of regular reporting to the Authority.[113] In this session, the relation between the

mining code and the Convention was emphasized, and it was pointed out that the mining code had a regulatory nature and was not a constitutional document, and legally it was dependent on the Convention.[114]

The main debate in the resumed third session in the summer of 1985 was the method of ensuring that the two sites proposed by the applicant were of equal estimated commercial value. In addition to the random selection of one site for the Authority, the possibility of using the plan of work for that purpose was also examined. Questions were raised in this respect whether the applicants had the obligation to prepare a detailed plan of work for both the reserved and non-reserved areas, and whether information based on prospecting was sufficient or more detailed information had to be supplied.[115]

Special Commission 3 completed a first reading of the draft rules on prospecting, exploration and exploitation in the spring meeting of 1986. A controversial question addressed by the Commission in this session was whether the submission of an application to the Authority should be in one stage containing both the designation of an area for the Authority and approval of the plan of work for the applicant, or in two stages, namely, submission of an application with the necessary information to enable the Authority to designate a reserved area and submission of the plan of work with more detailed data for approval. The latter was supported by the industrialized countries while the former was favourable to the developing countries which thought that the one-stage scheme would yield sufficient useful information on the reserved area.[116]

Almost the whole resumed fourth session in the summer of 1986 was devoted to discussing the financial terms of contract. The general opinion was that the enforcement of the provisions embodied in Article 13 of Annex III of the Convention seemed to be inappropriate with due regard to the prospects for sea-bed mining in the foreseeable future.[117] It was more clear that, even in this case, there was a sharp conflict of opinion between the developing and the developed countries. The fifth session of 1987 also continued the examination of draft regulations dealing with the financial terms of mining contracts. In addition to this issue, the 1988 session was devoted to the question of transfer of technology to the Enterprise.

Because of the significant role that the rules and regulations drafted by Special Commission 3 will play in the interpretation of the basic principles of the Convention concerning deep sea mining, the work of this Commission has been carefully followed. Even here, uncertainty prevails and the outcome of the debates has not yet come to a definitive conclusion. Due to the general tendency in favour of joint venture as an operational option, it may be expected that some incentives for such an arrangement will be considered in the process of drafting the sea-bed mining code.

5. The Law of the Sea Tribunal

Special Commission 4 is charged with the task of making the practical arrangements for the establishment of the International Tribunal for the Law of the Sea. The areas of study of this

commission are: the Tribunal, registration, contentious procedures, advisory opinions and the Sea-Bed Disputes Chamber.[118]

Special Commission 4 decided, in the spring of 1984, to start its work by reviewing the procedural rules of the Tribunal, basing discussions on the rules of the ICJ. For example, representatives of parties and witnesses; staff rules, expenses of the Tribunal; the acquisition of property needed for its operatives; and the organization of certain services such as documentation and a library. Although the procedural rules of the ICJ were only a guide, any departure from these rules in order to expedite the resolution of disputes at the least possible expense, was unthinkable.[119] Other subjects of interest such as access by entities other than states, which had no precedent in the ICJ, and composition of the Tribunal and its various chambers, were also touched upon, but detailed discussions were deferred to later sessions. Since the Federal Republic of Germany had not yet signed the Convention, the Soviet Union suggested that the Commission should choose a site other than Hamburg for the Tribunal.[120]

Further to the request of Special Commission 4, the Secretariat prepared a comprehensive paper containing four parts on the composition and functioning of the Tribunal and its registry, the proceedings in disputes, the organization and the functioning of the Sea-Bed Disputes Chamber and advisory proceedings.[121]

In the summer of 1984, the first reading of part 1 was completed, and the part on proceedings in disputes was considered, but the complete reading of the rest was postponed to the next meeting. Like in the case of the Legal and Technical Commission of the Council, here in Special Commission 4 doubts were expressed

concerning formal adherence to the principle of equitable geographical distribution as a criterion for the election of members of the Tribunal and its chambers.[122]

This review of the draft rules of procedure for the Tribunal continued in the spring of 1985. The question of the seat of the Tribunal was raised again, this time in connection with certain rules such as those dealing with immunities and privileges of the Tribunal and its staff. Such rules normally had to be dealt with in the context of the headquarters' agreement with the host country, and without a definite position on the seat of the Tribunal, discussion could tend to be hypothetical.

The major issue before Special Commission 4 was the question of prompt release of vessels as laid down in Article 292 of the Convention.[123] Consideration of detailed draft articles on this issue occupied the greater part of the resumed third session in the summer of 1985. The question of the seat of the Tribunal was not touched on at this session, but the Commission focused on that matter in its fourth session in the spring of 1986. The Secretariat had provided Special Commission 4 with some information about the establishment of the headquarters of the international courts and tribunals.[124] It was decided that the next meeting would also be devoted to the same question.

The discussions about the location of the Tribunal were rather brief in the resumed fourth session. The Chairman of Special Commission 4 suggested that the date of receipt of the sixtieth instrument of ratification of the Convention would be designated as the dead-line by which the Federal Republic of Germany would have to have acceded to the Convention in order to keep Hamburg as the seat

of the Tribunal. The fifth session, in 1987, continued the discussion on the seat of the tribunal, with no agreement.

By the end of 1988, Special Commission 4 had completed its first reading of the rules of procedure of the Tribunal, and had addressed almost all questions before it. The work of this Commission seems to be relatively easier than that of the other Special Commissions mostly due to its mandate which had never included the more controversial issues of the Conference. The question of the seat of the Tribunal has certainly delayed the progress of the work of this Commission, but neither this nor any other issue seems to be insurmountable.

SECTION IV: EVALUATION

The outcome of the work of the Preparatory Commission, during its first six years of activities is not so impressive as one could expect since the adoption of Resolution I. The number of states which have ratified the Convention is more than half the number required to bring that instrument into force, but it can hardly be said that the Preparatory Commission had completed half of its work during the same period of time.

There are many reasons for this delay and continuation. The most significant of all is the uncertainty which has prevailed over the future of sea-bed mining since the beginning of the 1980s, partly due to the gloomy picture of the future market for the minerals contained in the manganese nodules, and partly because

of discoveries of resources such as polymetallic sulphides and manganese crusts which may be found in areas under coastal state jurisdiction. This uncertainty has decreased the degree of urgency which was felt towards the end of the Conference for the establishment of the Authority and the Tribunal. Another reason, which is a direct result of the first one, is the lack of a clear picture of objectives and time frames for achieving them.

The outcome of the work of the Preparatory Commission in several areas, such as the organization and operation of the Enterprise and the impact of deep sea mining on the economies of the developing land-based producer states, has so far amounted to some broadly formulated draft rules which most probably will have to be adjusted later to meet actual requirements.

Finally, mention should be made of the complicated question of overlapping areas as a reason for the delay in the progress of the work.

It is clear from the contents of Resolution II and the headlines set out in it for the registration of the pioneer investors that delegations at the Conference never imagined that the question of overlaps would prove to be so difficult to resolve. The protracted negotiations for finding a solution to that issue have certainly had some impact on the speed of work in the Special Commissions. That is specifically true in the case of Special Commission 2 in charge of establishing the Enterprise.

An unwritten objective of the Preparatory Commission, at least as hoped by some of the industrialized countries, has been to draft detailed rules, regulations and procedures for the Authority in such a way that most of the developed countries with the necessary

technology and investment possibilities for deep sea-bed mining will be encouraged to join the Convention. The fulfilment of such an objective requires both flexibility and awareness. The Preparatory Commission has so far demonstrated both merits on several occasions: increasing support for joint ventures or some sort of joint arrangement as a realistic operational option for the Enterprise, or the delicate solution to the problem of the overlapping claims under the revised version of the Arusha Understanding, are examples.

In interpreting the basic conditions for deep sea mining into details rules and regulations, the Preparatory Commission has the delicate task of showing flexibility while being conscious of keeping all compromises within the framework of the common heritage of mankind, that is, the exploitation of the resources of the deep sea-bed for the benefit of mankind as a whole.

Footnotes - Chapter Seven

1. Ogley, op. cit., p.234. See also, Informal Working Paper by the United States, An Approach to Interim Protection of Investment, IA/1 of 2 April 1980.

2. Paolillo, op. cit., at p.294.

3. Ogley, op. cit., at p.225.

4. L.S. Ratiner, "The Law of the Sea: A Crossroads for American Foreign Policy", 60 Foreign Affairs (1982), pp.1006-21, at p.1014.

5. Resolution I is Annex I of the Final Act of the Conference and is produced in United Nations Publication Sales No. E.83.V.5, pp.175-76, 1983.

6. Ibid., pp.177-82. It should be noted that the interim regime for the protection of the preparatory investment is confined to the polymetallic nodules, and is not applicable to other minerals including the polymetallic sulphides. According to Article 162(2)(o)(ii) of the Convention:
"Rules, regulations and procedures for the exploration and exploitation of any resource other than polymetallic nodules shall be adopted within three years from the date of a request to the Authority by any of its members to adopt such rules, regulations and procedures in respect of such resources."
For discussion on the polymetallic sulphides and an analysis of the provisions of the Convention concerning the mineral resources other than polymetallic nodules, see S.A. Meese, "The Legal Regime Governing Seafloor Polymetallic Sulfide Deposits", 17 ODIL (1986), pp.131-62.

7. LOS/PCN/27.

8. For example, in 1983, when the Commission was established, the U.S. refused to pay its assessed share of the costs of the Preparatory Commission. See Patrick J. Hynes, "United Nations Financing of the Law of the Sea Preparatory Commission: May the United States Withhold Payments?", 6 Fordh.ILJ (1982-83), pp.472-500, at p.472.

9. See Off. Rec., Vol. 13, p.93.

10. The question was not purely academic. For instance, the Havana Charter for the International Trade Organization has never entered into force and the preparatory body for ITO (Interim Commission for International Trade Organization) was finally dissolved in 1951.

11. A/CONF.62/L.70, para. 19 (Off. Rec., Vol. 15, p.149).

12. The official sessions of the preparatory commission can be listed as follows:

First Session:	First part, Kingston, Jamaica from 15 March to 8 April 1983. Second part, Kingston, Jamaica from 15 August to 9 September 1983.
Second Session:	Kingston, Jamaica, from 19 March to 13 April 1984. Geneva meeting from 13 August to 5 September 1984.
Third Session:	Kingston Jamaica, from 11 March to 4 April 1985. Geneva meeting from 12 August to 4 September 1985.
Fourth Session:	Kingston, Jamaica, from 17 March to 11 April 1986. New York meeting from 11 August to 5 September 1986.
Fifth Session:	Kingston, Jamaica, from 30 March to 6 April 1987. New York meeting from 27 July to 21 August 1987.
Sixth Session:	Kingston, Jamaica, from 14 March to 8 April 1988. New York meeting from 15 August to 2 September 1988.

The Preparatory Commission is continuing to hold more sessions.

Sources: Office of the Special Representative of the Secretary-General for the Law of the Sea, Law of the Sea Bulletin, Special Issue, 1 March 1987.

13. Second preambular paragraph of Resolution I.

14. Paolillo, op. cit., p.296. Rules 2 and 3 of the Rules of Procedure of the Preparatory Commission differentiate between "observers" which have signed the Final Act of the Conference, and are entitled to "participate fully in the deliberations of the Preparatory Commission" and "other observers" which have not signed that document and may only be present at the meetings. See UN Doc. LOS/PCN/28.

15. Resolution I, para. 13.

16. UN Doc. LOS/PCN/28, rule 10(1).

17. Ibid., rules 13 and 14(3).

18. The said paragraph reads: "The rules of procedure of the Third United Nations Conference on the Law of the Sea shall apply mutatis mutandis to the adoption of the rules of procedure for the Commission."

19. Paolillo, op. cit., pp.298-99.

20. UN Doc. LOS/PCN/28, rule 35(1)(a).

21. The Convention, Article 160(2)(e).

22. See Chapter Six.

23. This point has been observed by Paolillo, but no reason for the interpretation of the Commission is mentioned. See Paolillo, op. cit., p.300.

24. UN Doc. LOS/PCN/28, rule 36(2).

25. One exception is the case of the final report of the Commission. If the adoption of the report by consensus is not possible before the final part of the year preceding the establishment of the Authority, according to rule 35(a) of the Rules of Procedure, recourse should be had to a two-thirds majority vote.

26. The last preambular paragraph of Resolution II.

27. Resolution II, para. 1(a)(i) and (ii). The names of the multinational consortia are not given, but as the names of the countries of nationality of their components are mentioned, their identity is established. The reason for not mentioning the names of the consortia in the resolution is, according to Ogley, the opposition of the Soviet Union on the ground that "it was improper for the Conference to name companies and give them, as such, the status of pioneer investors". See Ogley, op. cit., p.232. For the list of mining consortia, see Chapter 5, note 123 and LOS/PCN/WP.16/Rev.1.

28. Resolution II, para. 9(a).

29. Ibid., paras. 2(a) and 9(a).

30. Ibid., para. 3(a) and (b).

31. Ibid., para. 12(a)(i).

32. Ibid., para. 11(a).

33. Ibid., para. 7(b) and (c).

34. Ibid., para. 12(a)(ii).

35. Ibid., para. 12(a)(iii).

36. UN Doc. LOS/PCN/4 (the Soviet Union) and 7 (India).

37. UN Doc. LOS/PCN/8 (France), 9 (The Federal Republic of Germany), 10 (Italy), 11 (Japan), 12 (France), 14 (Belgium), 15 (Canada) and 18 (the Netherlands).

38. UN Doc. LOS/PCN/19 and 21.

39. UN Doc. LOS/PCN/30 (the Soviet Union) and 32 (India).

40. L. Kimball, "Preparatory Commission: The Long Road to Success", 8 Marine Policy (1984), pp.363-66, at p.364.

41. Ibid.

42. K.R. Simmonds, "The Status of the United Nations Convention on the Law of the Sea 1982", 34 ILCQ (1985), pp.359-68, at p.365. See also "Commission Studies Sea-Bed Mining Rules", 21 UN Chronicle (1984), No. 4, pp.44-50, at p.44.

43. Ibid.

44. Report on Matters Relatable to the Work of the Preparatory Commission, issued by the Asian-African Legal Consultative Committee, Doc. No. AALCC/XXV/4, p.16, 1986.

45. See Chapter Five.

46. UN Doc. LOS/PCN/45 (Japan).

47. Ibid.

48. UN Doc. LOS/PCN/48.

49. UN Doc. LOS/PCN/50 (Japan) and 51 (France).

50. UN Doc. LOS/PCN/L.8.

51. UN Doc. LOS/PCN/WP.16/Rev.1.

52. UN Doc. LOS/PCN/WP.24.

53. They are Ocean Mining Associates (156,000 km^2), Ocean Management Inc. (135,000 km^2) and Ocean Minerals Company (165,000 km^2). The fourth consortium, Kennecot, which had applied for two licences, requested a delay in the issuing of the licence in waiting to acquire a licence from the United Kingdom. See L. Kimball, "Short-term dilemmas and long-term prospects at the Preparatory Commission", 9 Marine Policy, (January 1985), pp.73-77, at p.73.

54. UN Doc. LOS/PCN/72.

55. The statement of Warioba was based on an understanding agreed upon by all parties. See UN Doc. LOS/PCN/L.13/Add.1.

56. UN Doc. LOS/PCN/56.

57. L. Kimball, "Holding pattern or forward motion?", 9 Marine Policy (1985), pp.340-43, at p.341. UN Doc. LOS/PCN/60 (the Netherlands), 61 (Belgium), 62 (Italy), 63 (Canada).

58. L. Kimball, "Heated exchange in Geneva", 10 Marine Policy (January 1986), pp.60-62, at p.60.

59. UN Doc. LOS/PCN/64.

60. Ocean Policy News, published by Citizens for Ocean Law (later Council of Ocean Law), p.3. Washington, D.C., 1985.

61. UN Doc. LOS/PCN/L.21 and LOS/PCN/72.

62. "Sea-Bed Commission condemns issuing of licences for exploitation of international area", 23 UN Chronicle (August 1986), pp.107-109, at p.108. The text of the Arusha Understanding was not issued as a document of the Commission, but was distributed among the delegations.

63. Ocean Policy News, May 1986, p.5.

64. According to para. 3(b) of Resolution II, it is the Preparatory Commission which shall designate the part of the area which is to be reserved in accordance with the Convention for the conduct of activities in the Area by the Authority through the Enterprise or in association with developing states. The other part of the area shall be allocated to the pioneer investor as a pioneer area.

65. Ocean Policy News, May 1986, p.6.

66. UN Doc. LOS/PCN/78.

67. "Statement on the Implementation of Resolution II", UN Doc. LOS/PCN/L.41, pp.9-13.

68. Ibid., p.12, para. 18.

69. UN Doc. LOS/PCN/WP.20.

70. UN Doc. LOS/PCN/L.6, para. 17.

71. UN Doc. LOS/PCN/WP.26.

72. Ocean Policy News, March-April 1985, p.5.

73. Some of these decision-making aspects were related to the Council procedures for approval of plans of work, a proposal

on the composition of the conciliation commission as envisaged in Article 16(8)(e) of the Convention, and the election of the Authority officers. For more details, see Ocean Policy News, October 1985, pp.4-5.

74. UN Doc. LOS/PCN/WP.31.

75. UN Doc. LOS/PCN/WP.33.

76. UN Doc. LOS/PCN/WP.32 and 34.

77. UN Doc. LOS/PCN/SCN.1/WP.1.

78. "Commission Studies Sea-Bed Mining Rules", op. cit., p.48.

79. UN Doc. LOS/PCN/SCN.1/1984/CRP.4.

80. UN Doc. LOS/PCN/SCN.1/WP.2.

81. UN Doc. LOS/PCN/L.9.

82. UN Doc. LOS/PCN/SCN.1/WP.3 and WP.4.

83. UN Doc. LOS/PCN/L.18, para. 6.

84. UN Doc. LOS/PCN/L.23.

85. UN Doc. LOS/PCN/SCN.1/WP.5; LOS/PCN/SCN.1/1985/CRP.6 and CRP.7.

86. UN Doc. LOS/PCN/L.23, para. 9.

87. UN Doc. LOS/PCN/SCN.1/WP.8.

88. "Sea-Bed Commission condemns issuing of licences for exploration of international area", op. cit., p.108.

89. UN Doc. LOS/PCN/SCN.1/1986/CRP.11.

90. Resolution I, para. 8 and Resolution II, para. 12.

91. UN Doc. LOS/PCN/L.5.

92. The Report of the Asian-African Legal Consultative Committee, op. cit., p.27.

93. UN Doc. LOS/PCN/SCN.2/L.2.

94. "Commission Studies Sea-Bed Mining Rules", op. cit., p.49.

95. Kimball, Preparatory Commission, op. cit., p.366.

96. In addition to the papers by the Federal Republic of Germany and the G77 on the joint venture, the Secretariat had also

prepared an information note on elements of joint ventures, UN Doc. LOS/PCN/SCN.2/WP.3.

97. UN Doc. LOS/PCN/SCN.2/L.2/Rev.1.

98. UN Doc. LOS/PCN/L.10.

99. UN Doc. LOS/PCN/SCN.2/WP.5.

100. All three papers were prepared by the Secretariat. UN Doc. LOS/PCN/SCN.2/WP.6, WP.7 and WP.8 respectively.

101. UN Doc. LOS/PCN/L.25, para. 2(c).

102. UN Doc. LOS/PCN/L.30, p.2.

103. Ocean Policy News, May 1986, p.9.

104. UN Doc. LOS/PCN/SCN.2/L.4 and L.5/Add.1.

105. UN Doc. LOS/PCN/SCN.2/WP.10.

106. Ocean Policy News, May 1986, p.10.

107. Ibid., September 1986, p.5.

108. Kimball, Preparatory Commission, op. cit., p.366.

109. UN Doc. LOS/PCN/SCN.3/WP.3.

110. "Preparing for Sea-Bed Regime: An Agreement on Claims Procedures", 21 UN Chronicle, No. 7 (1984), pp.28-34, at p.34.

111. Article 2 of Annex III of the Convention contains provisions for prospecting such as submission of a written undertaking that the prospector will comply with the Convention and will accept verification by the Authority of compliance therewith.

112. UN Doc. LOS/PCN/L.16, para. 6.

113. UN Doc. LOS/PCN/L.16.

114. The Report of the Asian-African Legal Consultative Committee, op. cit., p.31.

115. UN Doc. LOS/PCN/L.26, para. 16.

116. UN Doc. LOS/PCN/L.32, p.2.

117. UN Doc. LOS/PCN/L.38.

118. UN Doc. LOS/PCN/L.4.

119. The ultimate goal was to adopt such rules which make the Tribunal attractive to the states parties; see "Commission Studies Sea-Bed Mining Rules", op. cit., p.49.

120. The Federal Republic of Germany rejected this argument by linking the location of the Tribunal to Germany's having acceded to the Convention by the time of its entry into force. On the Soviet question on this respect, see ibid., p.50.

121. UN Doc. LOS/PCN/SCN.4/WP.2.

122. UN Doc. LOS/PCN/L.12.

123. According to Article 292 of the Convention, in the event that negotiations between two states parties concerning the prompt release of a vessel flying the flag of one of them and detained by the other fail, the question of release can be submitted to the Tribunal, which should act without delay. The authorities of the detaining states shall comply with the decision of the Tribunal governing the release. Since due to the broad range of activities covered by the Convention the risk of the detention of the vessels on the charge of violating a rule is considerable, having clear and detailed rules for the Tribunal in this respect is a matter of concern both to the coastal states and shipping states.

124. UN Doc. LOS/PCN/SCN.4/1986/CRP.19.

CHAPTER EIGHT

GENERAL CONCLUSIONS

To conclude this study one has to observe certain points. We have before us a Convention to which 159 signatures and more than 35 ratifications have so far been appended. The vacuum or inadequacy which, in fact existed then in respect of the legal principles and rules for the exploitation of the mineral resources of the Area is clearly replaced by a comprehensive regime negotiated through the active participation of almost all the countries of the world, and incorporated, as the major part, into the Convention. There also exist seven domestic laws enacted by the industrialized countries for the same purpose, though they have an interim nature pending the entry into force of the Convention for the respective enacting states.

In 1967, and later throughout almost the entire period of the negotiations at the United Nations, there existed an enthusiasm about the role that the recovery of the resources of the deep sea-bed would play in diminishing the gap between the developing and industrialized countries, on the one hand, and the access of the consumer countries to more stable sources of strategic minerals, on the other. This enthusiasm has, to a great extent, faded away now and seems to have been replaced by a sense of indifference and frustration by the industrialized and developing countries respectively. Two factors seem to be responsible for the present situation. The first is the considerable fall in demand by the world market for the minerals contained in the manganese nodules and the consequent depression of prices and abundance of supply.

Future prospects for these minerals are not so bright either. Moreover, new sources of related minerals have recently been discovered in areas generally under national jurisdiction. These

have rendered sea-bed mining an unprofitable business for the near future. Thus, the industrialized countries do not feel the same degree of urgency for the start of the commercial recovery of these resources as they felt some years ago. The second factor is that the developing countries, after a forceful initial urge towards establishment of a NIEO in the late 1960s and early 1970s, and the resistance of the industrialized countries, today find themselves faced with an impasse where political freedom alone cannot improve their poverty, and the developed countries have shown that they are not yet prepared to yield to the demands of the Third World. The ensuing frustration has its influence on the attitude of the developing countries towards the law of sea-bed mining.

Notwithstanding the existence of this situation of indifference and frustration about the future of sea-bed mining which finds its genesis in the politico-economic attitudes of the states and is subject, therefore, to rapid change, the present status of the law in respect of these activities should be evaluated from both the general and specific points of view. The general view takes into account the success or failure of those involved in the making of a universal law for sea-bed mining through the United Nations as an effort to realize one of the distinguishing features of the contemporary international legal order, whereas the specific view explains the pros and cons of the legal regime for sea-bed mining as incorporated in the Convention and the status of the domestic law as an alternative regime.

It is true that, as a signifying characteristic of the last three decades, efforts on an unprecedented scale have been made to adopt general multinational conventions on different branches of

international law,[1] but the UNCLOS III has undisputedly been the first real testing ground for the majority of the developing countries to actively participate in the process of law-making at the international level, and thereby contribute, on an equal standing with the industrialized countries, to the progressive development of the law in a field so strategically, politically and economically important to the Western powers.

In order to understand the difficulty of the task and the significance of any progress in negotiating a law acceptable to all countries and not promulgated by the few Powers and extended to the rest - as used to be the case - one has to recall that the industrialized countries, realizing the qualitative changes in the international community as a result of the decolonization process of a great number of the African and Asian countries, were prepared to accept a change in the traditional legal framework, provided such a change "does not take the form of a radical break, but is gradual, and . . . it is effected with their active participation and co-operation".[2]

The developing countries, on the other hand, considered the international law that originated in Europe as non-responsive to their needs and necessities and pleaded for a radical change in the law to reflect the views of all countries as a world law.[3] Such a world law whose main function is preserving peace and facilitating international cooperation should take into particular consideration the needs and interests of the developing countries.

With these as points of departure, the difficulty was to reconcile the view of the industrialized countries which attempted to preferably preserve the status quo and that of the developing

states which struggled for a profound alteration in the existing legal order.

The core of the problem was to make a choice between creating a legal arrangement on the basis of the free enterprise system - laissez faire - which could naturally favour the industrialized countries, or establishing a powerful international organization to control and manage the Area and its resources for the benefit of the international community, with particular regard to the needs and interests of the developing countries.

For both the developing and the industrialized countries, negotiations on the legal regime of the sea-bed had a significant pattern, the result of which might be used as a prototype in future negotiations in other fields of international relations. Hence, any compromise from any side had not only an immediate implication in respect of the legal regime of the sea-bed, but also an extensive consequence for long-term dialogue between the North and the South.

Unlike other negotiations in the framework of the North-South dialogue for the establishment of a New International Economic Order, for example, the negotiations at UNCTAD concerning the International Programme for Commodities - where the developing countries usually could participate with the strong position of a party which had something to offer, deliberations about the legal regime of the sea-bed were carried out between one party which was virtually empty-handed at the negotiation table, i.e., the developing countries, and the other party- the industrialized - which had the necessary advantage, i.e., technology and money, to exercise pressure to secure its own interests. What could compensate to some extent these unequal negotiating positions was

the strong will of the developing countries as a considerable political force to demand a change in the prevailing system of international economic cooperation and the realization of the industrialized countries of the need to work out a law acceptable to all countries.

The legal regime for the sea-bed, as embodied in the Convention, was formulated after 14 years of negotiations. The Conference, unlike any other forum for negotiating international issues, benefited from the consensus procedure as the mode of adopting the provisions of the Convention. The complex difficulty of the task of the Conference in respect of the progressive development of international law concerning sea-bed mining, together with the consensus procedure, rendered the successful completion of this important undertaking rather doubtful. The fact that the partici- pating representatives of states succeeded in bringing the conference to an end which is generally recognized as successful and acceptable, and producing a convention that has so far received 159 signatures from all classes of states, acknowledges that what was a quarter of a century ago a prudent forecast about the future of international law is now the reality of our time.[4] In other words, the imperatives of the international law of cooperation require the adoption of rules which contain the interests of the international community as a whole. The provisions of the Convention in respect of the Sea-Bed Area is demonstrative of the law resulting from a clash between old and new trends in international relations, a compromised general guideline acceptable to the vast majority of states, though in no way ideal for any one state or group of states. These are, in fact, the characteristics of the international law of

today, and the adoption of the Convention is, per se, and regardless of when it enters into force and how the regime of the Sea-Bed Area will apply in practice, an outstanding success.

The adoption of domestic laws by several industrialized countries at the end of the work of the Conference or after the adoption of the Convention seems to be an effort to retain the traditional pattern of norm-creating in international law. With regard to the declared purpose of these laws and their interim nature, the possibility exists that an alternative order based on these statutes will become operative alongside the legal regime laid down in the Convention. Nevertheless, it is difficult to imagine that such an alternative, due to its inherent contradiction of the politico-economic and sociological realities of the present time, i.e., the existence of over 120 states - all sovereign equals - with interests, needs and demands often different from those of the industrialized countries of the West, can ever become practical. Even if the two regimes operate side by side for a time, it is reasonable to expect that they shall merge fairly soon, partly due to the need for stability which is the prerequisite of any legal order which industrialized countries cannot afford to disregard, and partly due to the persistent demands of the developing countries for access to technology and capital which may eventually induce them to make even more concessions in order to attract the technologically advanced countries to join the Convention.

Having dealt with the importance of the law of the sea-bed activities in the context of the contemporary international legal order from a general point of view, it is now relevant to dwell upon the said legal regime from a more specific aspect.

1. As regards the legal status of the Sea-Bed area and its resources, the concepts of res nullius or res communis were never taken up seriously as a suitable alternative and the citation of the principle of the freedom of the high seas by the industrialized countries was more of a tactical move than one of sincere faith. The principle of the common heritage of mankind emerged as a new alternative suitable for a new situation. This principle has always had different implications for developing and developed countries. For developing countries, it was in fact this principle which decisively determined the form and context of the future regime for the sea-bed area, whereas for the developed countries, the structure of the future regime could give any legal context to this principle.

All those countries which voted for the Declaration of Principles explicitly admitted that res nullius and res communis and the principle of the freedom of the high seas are not adequate as regards the legal status of the deep sea-bed and its resources. The active participation of the industrialized countries in more than 14 years of negotiations was certainly not to repeat that the sea-bed area and its resources are either res nullius or res communis, or the principle of the freedom of the high seas applies to that area and its resources. The formulation of Articles 136 and 137 of the Convention, which specify the sea-bed area and its resources as the common heritage of mankind, not subject to any state sovereignty, is formulated by the consent of both developing and industrialized countries.

Repeated statements of the representatives of states as well as state practice in the form of declarations, domestic legislation

etc., during the last 20 years are evidence of the fact that the common heritage of mankind, as the principle designating the legal status of the sea-bed, has acquired the element of opinio juris necessary to render it a part of customary international law, and its far-reaching implications and nature, which have given birth to many other principles applicable to areas and resources beyond national jurisdiction, have endowed this principle with the quality of a general principle of international law.

2. From the two opposing doctrines of laissez-faire and total international control, a compromise emerged between the developing and the industrialized countries concerning the system of exploitation of the resources of the Area, commonly identified as the Parallel System. This compromise gave rise to two significant problems: a) to harmonize the right of access of the states parties, state and private entities to the Area and its resources with the exclusive rights of the Authority as the trustee of mankind; and b) to obtain a balance of rights and duties between the states parties, public and private entities on the one side and the Authority on the other.

The acceptance of the Parallel System by the G77 which amounted to the recognition of the right of states and natural persons to participate in the activities in the Area coincided with the adoption of a policy by the industrialized countries to weaken the Authority and its chance to be a commercial competitor. An analysis of the provisions of the Convention in respect to the Parallel System shows that the industrialized countries have succeeded in finding answers favourable to their own position as regards the question of access and balance. The powers of the

Authority in handling an application for contracts by states parties or natural or juridical persons are more or less formal and symbolic. Any applicant who fulfils certain prescribed requirements of the Convention may virtually have automatic access to the Area. The efforts to bring about a balance between the Authority and the other entities through the endowment of preferential treatment to the Enterprise and the developing countries have failed in favour of states parties and their entities. The so-called preferential treatments are either time limited or subject to limitation of other provisions of the Convention. The real balance may be obtained when the Enterprise, with its financial, technological and managerial weaknesses, acquires permanent, independent and effective access to the necessary capital and technology. The amendment procedure envisaged in the provisions related to the Review Conference may pave the way for such a development.

3. The International Sea-Bed Authority, which is in charge of the management of the Area and its resources, both because of the nature of its purposes and functions and its legislative power, is a unique international organization. Its purposes and functions, i.e., representation of mankind and conducting activities in the Area on behalf of mankind, necessitates the concentration of power in its plenary organ, the Assembly; but this body, as is evident from the provisions of the Convention, is a merely symbolic organ, and the real power rests in the executive body, the Council, both the composition and the decision-making procedure of which represent special interests of some particular groups of states and not mankind. This is in contradiction with the dictates of the

principle of the common heritage of mankind which requires a de facto superior status for the Assembly as the plenary of the representatives of all states parties, presumed to include mankind as a whole. The compromise on the Parallel System was followed by many concessions by the G77 in respect of the International Sea-Bed Authority, and the result is an organization with practically no discretionary power, and with a decision-making procedure which makes it possible for a few states to block decisions which may be against their national interests, but beneficial to the international community as a whole.

The Enterprise, as a commercial company belonging to the Authority, carrying out activities in the Area either by itself or together with state or private entities in the form of joint arrangements, is dependent on the contribution of the states parties for both technology and money. This dependence, together with the bureaucratic restraints caused by the relation of the Enterprise with the political organs of the Authority, may put its chances for success as a competitor to large mining companies in question.

4. The effort to establish a system for the settlement of disputes raised from the activities in the Area was, like other elements of the legal regime of the sea-bed, subject to the compromise between the two main interest groups of states, namely, developing and industrialized countries. One significant concession from the side of the developing countries was to accept commercial arbitration in cases of disputes relating to the interpretation and application of contracts where the Authority is one of the parties and giving locus standi to private persons and entities before the tribunal. Another important setback to the G77 was the agreement to confer

upon the Sea-Bed Disputes Chamber the competence to rule on the applicability of the Authority's decisions in particular cases. Despite the drawbacks, the sea-bed disputes settlement system is the only constituent element of the legal regime of the sea-bed which seems to be workable even in its present shape. Its possible workability rests on its comprehensibility, flexibility and its compulsory character which leads to binding decisions.

5. The domestic laws for deep sea mining enacted by a few industrialized countries, although bearing the attribute of being interim in nature pending the entry into force of the Convention for those countries, are incompatible with the regime embodied in the Convention and not acceptable to the majority of states. If one recalls that the acceptance of many provisions concerning the legal regime of the sea-bed area and the submission to many compromises and concessions by the developing countries have been only to induce the industrialized countries to join the Convention and accept its sea-bed legal regime, it becomes evident that attribution of the interim nature to these laws and expressed disclaimer of sovereignty may not render them internationally acceptable. Neither may citation of freedom of the high seas legally justify the adoption of these instruments. The universal consensus of the principle of the common heritage of mankind through the adoption of the Declaration of Principles in 1970 was, to say the least, the expression of opinio juris with respect to the form of the management of the Area and its resources. The requirement of cooperation in the rational management did not leave any place for unilateral acts.

The proponents of the domestic laws have tried to justify these instruments by arguing that, while the Area and its resources can be

the common heritage of mankind, they may be explored and exploited as a freedom of the high seas. In this way, they insist that there is no contradiction between these laws and the purposes of the regime embodied in the Convention, i.e., rational management of the Area and its resources for the benefit of mankind as a whole. However, the obvious incompatibility of these laws with the provisions of the Convention render assertion unwarranted, and give rise to the question of whether such painstaking negotiations were at all necessary if the ultimate choice were going to be the enactment of domestic laws based on the freedom of the high seas, and whether these states have negotiated in good faith.

Finally, after reviewing the specific aspects of the existing law of the sea-bed mining activities and the relation of national law with the regime embodied in the Convention from a specific point of view, mention will be made of two particular expectations which were generally expressed by the delegations at the beginning of the negotiations on the legal regime of the deep sea-bed, namely, the universality of the resulting instrument and the particular attention to the needs and interests of the developing countries.

Not only as a logical effect of the principle of the common heritage of mankind, but also with due regard to the fate of the 1958 Geneva Conventions on the Law of the Sea, to which a small part of the international community had acceded, it was generally felt that the legal regime of the sea-bed should have a universal character to become viable.

Three important states with special interests in sea-bed mining, namely, the United States, the United Kingdom and the Federal Republic of Germany, have not yet signed the Convention

mainly because of dissatisfaction with the provisions concerning the legal regime of the deep sea-bed, but many other countries such as Canada, France, Italy, Japan, Belgium, the Netherlands and the Soviet Union, all with the necessary technology, have signed the Convention. Irrespective of how many of those 159 entities which have signed the Convention would eventually ratify it, one may argue that, if signing the Convention is to be interpreted as an evidence of undertaking not to act contrary to the purposes of that document, even though the Convention has not yet achieved universality in a strict sense, it certainly has acquired something very close to that.

As regards the second expectation, i.e., due attention to the needs and interests of the developing countries, the scheme provided for in the Convention is far from the ideal power and resource distribution with preferential status for the developing countries. Thus, although consideration is shown to the needs of the developing countries in the form of granting them priority in the enjoyment of the proceeds of the sea-bed mining activities, the real issue, i.e. enabling those countries to actually participate in the activities through transfer of the technology, training of related personnel and financing, have been left almost neglected. Nonetheless, bearing in mind the negotiating positions of the developing and the industrialized countries and having regard to all factors and circumstances, it would have been unrealistic to expect a result much different from that with which we are now faced. What the developing countries have achieved out of these negotiations, even if modest, is of extreme importance. It is now established that the needs and interests of the developing countries have to be

particularly taken into account in any future international negotiations for the establishment of any legal order between states.

Now that the Parallel System is generally accepted as a realistic alternative for the foreseeable future, efforts should be made to achieve a genuine balance between the two sides of the system by enhancing the actual possibilities of the developing countries and the Enterprise to participate in the activities of the sea-bed regime. The tendency to turn to joint arrangements such as joint ventures as a cost-effective alternative for the operations of the Enterprise in its initial stages of activities is a prudent and conscious step taken by the Preparatory Commission. This alternative, which can ease both the transfer of technology and the problem of financing, may give a better chance to small industrialized states such as Australia, Norway, New Zealand, etc., which are generally outside the international consortia, to enter into cooperation with the Enterprise.

The future alternative, however, is not joint arrangements. The aim should be to strengthen the Authority and its operating arm the Enterprise, so that it may independently carry out its functions. The experience which will be achieved as a result of actual exploitation of the mineral resources during the next two or three decades will facilitate the adoption of measures, in the Review Conference, which should contribute to the substantiation of that goal.

Footnotes - Chapter Eight

1. E.J. de Arechaga, "Customary International Law and the Conference on the Law of the Sea", in Makarczy (ed.), Essays in International Law in Honour of the Judge Manfred Lachs, pp.575-85, at p.576. The Hague" Nijhoff, 1984.

2. A. Cassese, International Law in a Divided World, p.106. Oxford: Clarendon, 1986.

3. Ibid., p.119. See also B.V.A. Rolling, International Law in an Expanded World, pp.5-16. Amsterdam: Djambatn.

4. Rolling, ibid., pp.vii-xxv.

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